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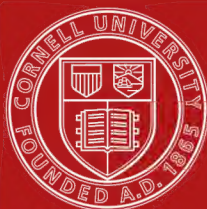
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A TREATISE
ON THE
LAW OF DEEDS

**THEIR FORM, REQUISITES, EXECUTION, ACKNOWLEDGMENT, REGIS-
TRATION, CONSTRUCTION AND EFFECT.**

COVERING

**THE ALIENATION OF TITLE TO REAL PROPERTY BY VOL-
UNTARY TRANSFER.**

TOGETHER WITH CHAPTERS ON TAX DEEDS AND SHERIFF'S DEEDS.

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SECOND EDITION REVISED AND ENLARGED
IN THREE VOLUMES.

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THE LAW OF DEEDS.

CHAPTER XXX.

DEED SUBJECT TO MORTGAGE.

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§ 1047. Purchase of equity of redemption merely.—A grantee does not become personally liable for the payment of the mortgage debt by taking a deed which is merely made subject to a mortgage, as to fasten such liability upon him the deed must contain language clearly importing the assumption of such an obligation. "The purchaser of mortgaged premises does not become personally liable for the debt secured, unless there is a special contract to pay such encumbrance."¹ "It is settled in this

¹ Johnson v. Monell, 13 Iowa, 300, 303; Dunn v. Rodgers, 43 Ill. 260; Strong v. Converse, 8 Allen, 557; 85 Am. Dec. 732; Stebbins v. Hall, 29 Barb. 524; Walker v. Goldsmith, 7 Or. 161; Hull v. Alexander, 26 Iowa, 569; Comstock v. Hitt, 37 Ill. 542; Weed Sewing Machine Co. v. Emerson, 115 Mass. 554; Winans v. Wilkie, 41 Mich. 264; Drury v. Tremont Improvement Co., 13 Allen, 168; Fowler v. Fay, 62 Ill. 375; Moore's Appeal, 88 Pa. St. 450; 32 Am. Rep. 469; Bumgardner v. Allen, 6 Munf. 439; Murray v. Smith, 1 Duer, 412; Collins v. Rowe, 1 Abb. N. C. 97; Campbell v. Patterson, 58 Ind. 66; Tillotson v. Boyd, 4 Sand. 516; Tanquay v. Felthausen, 45 Wis. 30; Lewis v. Day, 53 Iowa, 575; Binsse v. Paige, 1 Keyes, 87; s. c. 1 Abb. N. Y. App. 138; Winans v. Wilkie, 41 Mich. 264; Belmont v. Coman, 22 N. Y. 438; 78 Am. Dec. 213.

commonwealth," says Mr. Justice Endicott, of the Supreme Court of Massachusetts, "that where land is conveyed in terms subject to a mortgage, the grantee does not undertake or become bound by the mere acceptance of the deed to pay the mortgage debt. In the absence of other evidence, the deed shows that he merely purchased the equity of redemption. He is, indeed, interested in its payment, because it is an encumbrance upon the land of which he is the owner; but he has entered into no obligation, express or implied, to pay it, and if he parts with his title he no longer has any interest in its payment."¹

¹ In *Fiske v. Tolman*, 124 Mass. 254; 26 Am. Rep. 659. In *Merriam v. Moore*, 90 Pa. St. 78, 80, Mr. Justice Paxson, in delivering the opinion of the court, said: "In recent cases some attempts have been made to define with as much precision as possible the mutual and dependent rights and duties of mortgagees, mortgagors, the grantees of mortgagors, and the alienees of such grantees. (1) A conveyance of land 'under and subject' to a mortgage executed by the grantor, creates, as between themselves, a covenant of indemnity to the grantor on the part of the grantee. (2) If the grantee alien by a deed containing the same 'under and subject' clause, without more, the alienee does not assume a liability to the mortgagee, or undertake to discharge the grantee's covenant of indemnity. (3) It is competent, however, for the mortgagee to show by adequate evidence that the alienee has taken upon himself not only the grantor's duty to indemnify the mortgagor, but a personal obligation to pay the mortgage debt. (4) In all cases arising before the Act of 12th of June, 1878, this adequate evidence may consist of stipulations in the deed, of written articles outside its terms, or of a verbal contemporaneous agreement between the parties. And the fact of such an undertaking may be implied from circumstances attending and connected with the conveyance of the land: *Moore's Appeal*, 7 Norris, 450; 32 Am. Rep. 469; *Samuel v. Peyton*, 7 Norris, 465; and *Thomas v. Wiltbank*, 6 W. N. C. 477." And see, also, generally, *Hall v. Mobile & Montgomery Ry. Co.*, 58 Ala. 10; *Rourke v. Colton*, 4 Bradw. (Ill.) 259; *Lawrence v. Towle*, 59 N. H. 28; *McIntire v. Parks*, 59 N. H. 258; *Bennett v. Keehn*, 57 Wis. 582; *Ritchie v. McDuffie*, 62 Iowa, 46; *Guernsey v. Kendall*, 55 Vt. 201; *Andreas v. Hubbard*, 50 Conn. 351; *Wadsworth v. Lyon*, 93 N. Y. 201; 45 Am. Rep. 190; *Clark v. Fountain*, 135 Mass. 464; *Bowen v. Beck*, 94 N. Y. 86; 46 Am. Rep. 124; *Dean v. Walker*, 107 Ill. 540; 47 Am. Rep. 467; *Carnahan v. Tousey*, 93 Ind. 561; *Riley v. Rice*, 40 Ohio St. 411; *Welling v. Ryerson*, 94 N. Y. 98; *Squier v. Shepard*, 38 N. J. Eq. 331; *Bennett v. Bates*, 94 N. Y. 354; *Thompson v. Dearborn*, 107 Ill. 87; *Osborne v. Cabell*, 77 Va. 462; *Hall v. Morgan*, 79 Mo. 47; *Cooper v. Foss*, 15 Neb. 515; *George v. Andrews*, 60 Md. 26; 45 Am. Rep. 706; *Georgia Pacific R. R. Co. v. Walker*, 61 Miss. 481; *Johnson v. Walter*, 60 Iowa, 315; *Luney v. Mead*, 60 Iowa, 469; *Canfield v. Shear*, 49

§ 1048. Mention of mortgage by way of description.

A clause was inserted in a deed that it was made subject to a certain mortgage of a certain amount, recorded in a specified book and page in the volumes of records. A covenant was also inserted that the premises "are free from all encumbrances except as aforesaid." Interest was due on the mortgage at the time of the execution of the conveyance, and the grantee was afterward, for the

Mich. 313; *Rapp v. Stoner*, 104 Ill. 618; *Woodbury v. Swan*, 58 N. H. 380; *Chedel v. Millard*, 13 R. I. 461; *Bowne v. Lynde*, 91 N. Y. 92; *Sparkman v. Gove*, 44 N. J. L. 252; *Mechanics' Savings Bank v. Goff*, 13 R. I. 516; *Meech v. Ensign*, 49 Conn. 191; 44 Am. Rep. 225; *Carter v. Holahan*, 92 N. Y. 498; *Hill v. Howell*, 36 N. J. Eq. 25; *Parker v. Jenks*, 36 N. J. Eq. 398; *Schrack v. Shriner*, 100 Pa. St. 451; *Willard v. Worsham*, 76 Va. 392; *Jones v. Higgins*, 80 Ky. 409; *Forge v. Merryman*, 14 Neb. 513; *McConaghy's Estate*, 13 Phila. 399; *Twichell v. Mears*, 8 Biss. 211; *Gaffney v. Hicks*, 131 Mass. 124; *Hayden v. Snow*, 9 Biss. 511; *Reed v. Paul*, 131 Mass. 129; *Cilley v. Fenton*, 130 Mass. 323; *Lake v. Tebbetts*, 56 Cal. 481; *Muhlig v. Fiske*, 131 Mass. 110; *Locke v. Homer*, 131 Mass. 93; 41 Am. Rep. 199; *State v. Citizens' Bank*, 33 La. Ann. 705; *Flagg v. Geltmacher*, 98 Ill. 293; *Bassett v. Bradley*, 48 Conn. 224; *Follansbee v. Johnson*, 28 Minn. 311; *Dunning v. Leavitt*, 85 N. Y. 30; 39 Am. Rep. 617; *Fireman's Ins. Co. v. Wilkinson*, 35 N. J. Eq. 160; *Hosmer v. Campbell*, 98 Ill. 572; *Albany City Savings Institution v. Burdick*, 87 N. Y. 40; *Manhattan Life Ins. Co. v. Crawford*, 9 Abb. N. C. 365; *Taylor v. Mayer*, 93 Pa. St. 42; *Gilbert v. Sanderson*, 56 Iowa, 349; 41 Am. Rep. 103; *Vreeland v. Van Blarcom*, 35 N. J. Eq. 530; *Laing v. Byrne*, 34 N. J. Eq. 52; *Moore's Estate*, 12 Phila. 104; *Mahoney v. Mackubin*, 54 Md. 268; *Jones v. Parks*, 78 Ind. 537; *Figart v. Halderman*, 75 Ind. 565; *Dirks v. Humbird*, 54 Md. 399; *Talbut v. Berkshire Life Ins. Co.*, 80 Ind. 434; *Fenton v. Lord*, 128 Mass. 466; *Townsend Savings Bank v. Munson*, 47 Conn. 390; *Risk v. Hoffman*, 69 Ind. 137; *Erlinger v. Boul*, 7 Ill. App. 40; *Fitzgerald v. Barker*, 70 Mo. 685; *Lappen v. Gill*, 129 Mass. 349; *Coolidge v. Smith*, 129 Mass. 554; *Wharton v. Moore*, 84 N. C. 479; 37 Am. Rep. 627; *Judson v. Dada*, 79 N. Y. 373; *Zabriskie v. Salter*, 80 N. Y. 555; *Pardee v. Treat*, 82 N. Y. 385; *Fuller v. Lamar*, 53 Iowa, 477; *Hopkins v. Woolley*, 81 N. Y. 77; *Coles v. Appleby*, 22 Hun, 72; *Deyermant v. Chamberlin*, 22 Hun, 110; *Unger v. Smith*, 44 Mich. 22; *Hall v. Edwards*, 43 Mich. 473; *O'Neill v. Clark*, 33 N. J. Eq. 444; *Wharton v. Moore*, 84 N. C. 479; 37 Am. Rep. 627; *Merri-man v. Moore*, 90 Pa. St. 78; *Scionneaux v. Waguespack*, 32 La. Ann. 283; *Medsker v. Parker*, 70 Ind. 509; *Layman v. Willard*, 7 Ill. App. 183; *Logan v. Smith*, 70 Ind. 597; *Klein v. Isaacs*, 8 Mo. App. 568; *Booth v. Connecticut Mut. Life Ins. Co.*, 43 Mich. 299; *Strohauer v. Voltz*, 42 Mich. 444; *Urquhart v. Brayton*, 12 R. I. 169; *Delaware and Hudson Canal Co. v. Bonnell*, 46 Conn. 9.

purpose of preventing a foreclosure of the mortgage, compelled to pay this interest. The court held that the principal and interest constituted a single encumbrance, which was excepted out of the grantor's covenant, taking the view that the mention in the deed of the mortgage, and the reference to the book and page of record, were only by way of description and identification of the mortgage, and implied no covenant on the grantor as to the amount due.¹

§ 1049. Contract to take deed subject to mortgage. Where a person enters into a contract for the purchase of a piece of real estate subject to a certain mortgage, he may refuse to accept a deed in which a clause is inserted, that he assumes the payment of such mortgage.² A agreed to sell and convey to B certain premises subject to certain mortgages therein, and B assigned this contract

¹ *Shanahan v. Perry*, 130 Mass. 460. In that case the clause referring to the mortgage was as follows: "This conveyance is made subject to a mortgage deed of thirty-five hundred dollars from said Mary E. Schofield to Seth Clarke, of Salisbury, recorded with Middlesex Deeds, South District, lib. 1421, fol. 64." A statement in a deed that it is made subject to a mortgage may give notice of the mortgage, but the recital must be sufficient to make it the duty of the purchaser to inquire and to lead to the discovery of the mortgage. Where the mortgage is not recorded, the recital must be sufficiently definite to put the purchaser in a way of discovering the unrecorded mortgage: *McCrea v. Newman*, 46 N. J. Eq. 473; 19 Atl. Rep. 198. When the deed does not sufficiently identify the mortgage, its identity may be shown by parol evidence: *New York L. Ins. Co. v. Aitkin*, 125 N. Y. 660; *Dodge v. Porter*, 18 Barb. 193; *Jackson v. Clark*, 7 Johns. 214; *Loomis v. Jackson*, 19 Johns. 449.

² *Lewis v. Day*, 53 Iowa, 575; *Manhattan Life Ins. Co. v. Crawford*, 9 Abb. N. C. 365. In the latter case the court held that a finding that the grantee accepted a deed and assumed the payment of a mortgage therein mentioned was not sustained by the evidence, and said: "The assumption clause in the mortgage is in direct contravention of the express terms of the agreement itself. The deed containing it, it is clear from the evidence, was not delivered to Mr. Crawford personally, and the fair inference from the testimony is that he knew nothing about the existence of the assumption clause until long after the deed had been recorded. To justify a court in imposing such an obligation, which it must be said is an unusual one in the purchase of property, very satisfactory evidence should be given; indeed, so satisfactory as to leave no doubt of its propriety; and when the deed containing it is placed on

to C. Subsequently A executed a deed to C, which contained a clause that C assumed and agreed to pay said mortgages. C, without knowing that the deed contained this clause, but supposing that it, in this matter followed the contract, accepted the deed and put it on record. This clause was inserted in the deed without the knowledge or consent of A. The court held that the insertion of this clause in the deed was a fraud upon B, and that the deed might be reformed by striking out this clause.¹ The grantee is entitled to have the deed reformed in such a case unless an estoppel has arisen in favor of a third party. But it is held that where after the purchase of a mortgage, the premises are conveyed in accordance with a previous contract of this kind, subject to the mortgage, and the deed contains a clause by which the grantee assumes and covenants to pay such mortgage, the grantee

record, without having been exhibited to the grantee, the proof should be clear, positive, and beyond all question that it was authorized. Any other rule would place any citizen at the mercy of a mortgagor who chose to relieve himself of a burden which he did not wish to bear, and would become, in that way, a vehicle of great injustice and oppression."

¹ *Kilmer v. Smith*, 77 N. Y. 226; 33 Am. Rep. 613. Danforth, J., in delivering the opinion of the court, said: "The deed was to be drawn in pursuance of the contract, and to carry out the bargain therein expressed. It is plain that the deed goes much beyond the contract, and imposes upon the plaintiff an obligation not suggested or warranted by the terms of the agreement. It is also apparent from the contract that at the time of its execution both parties understood the difference between a conveyance, subject to a mortgage, and one with an agreement to assume and pay the mortgage. To warrant the imposition of such an obligation upon the plaintiff, required a new agreement, or at least an assent on his part. . . . The case is not to be regarded as one of mutual misunderstanding or mistake, but rather as a case where one party deliberately inserted in a deed, a covenant tending to his own advantage and another's prejudice, and the latter, in ignorance that the instrument contains the covenant, accepts it as in fulfillment of a contract which requires no such stipulation. The denial of relief in such a case would be at variance with long-established doctrines of courts of equity, and a reproach to the law itself: *Story Eq. Jur.* vol. 1, § 138 c. It has therefore been held that the ignorant party is entitled to relief, notwithstanding the other acted advisedly and upon full information, for that being admitted there is fraud: *Welles v. Yates*, 44 N. Y. 525; *Botsford v. McLean*, 45 Barb. 478; affirmed by Court of Appeals, May, 1870; *Rider v. Powell*, 28 N. Y. 310."

is not estopped from insisting as against such purchaser of the mortgage that the covenant places no liability upon him.¹ A contract of purchase provided that the purchasers were to take the property subject to a mortgage, but in the deed given to them there was a clause stating that they assumed the payment of the mortgage. In a foreclosure suit, judgment on this covenant was rendered against them for a deficiency. They were unable to find the contract at the time they were made parties to the foreclosure suit, and not until some time after judgment did they discover by the deed that they were made to assume the mortgage, the deed having been drawn without their inspection. They permitted the foreclosure suit to go by default. The contract of purchase was afterward discovered, and the court held that they were entitled to ask to have the judgment opened, and to seek permission to come in and defend.²

§ 1050. Deed to mortgagee subject to mortgage.—A deed of the mortgaged premises to the mortgagee subject to the mortgage, merges the mortgage, and thus discharges the mortgage debt. A mortgagor executed a deed for a tract of land, which was subject to a mortgage, the grantee assuming and agreeing to pay the mortgage. Subsequently the grantee conveyed the land to the mortgagee by a deed, in which it was recited that the deed was subject to the mortgage. The court held that thereby a merger of the mortgage resulted, and that although the value of the land at the time of the execution of the last deed was less than the amount of the mortgage, still the mortgagee could not maintain an action against the mortgagor on the mortgage note.³

§ 1051. Effect of deed from mortgagor to mortgagee as against intervening encumbrances.—The technical

¹ *Real Estate Trust Co. v. Balch*, 45 N. Y. Sup. Ct. (13 Jones & S.) 528.

² *Trustees of the Northern Dispensary of New York v. Merriam*, 59 Barb. 226. See, also, *Waring v. Somborn*, 82 N. Y. 604; *Deyermant v. Chamberlin*, 22 Hun, 110.

³ *Dickason v. Williams*, 129 Mass. 182; 37 Am. Rep. 316.

doctrine of merger will not be applied where the intention or the just interests of the party demand that the encumbrance should still continue subsisting. A and B mortgaged certain lots which they held in severalty to C, to secure the payment of a note. C was indebted to D, and assigned to the latter the note and mortgage as collateral security for his indebtedness. Subsequently, A executed a mortgage upon his part of the same lots to E, to secure a debt due to E from A and B. Still later, A and B conveyed the lots to C by a warranty deed, which was expressed to be subject to the mortgage of E, but it contained no clause obligating the grantee to assume or discharge such mortgage. It was held that the first mortgage was not merged in the fee, by the deed from the mortgagors to C, so far as the rights of C were involved; and that, at a sale upon foreclosure, the sum due upon the mortgage to C, being the prior lien, should be paid first, and what remained after paying the first mortgage should be applied to the second, and the surplus remaining after the payment of both mortgages, if any, should be paid to C.¹ But if the mortgaged premises are purchased by a senior mortgagee, and he undertakes to pay off a junior mortgage, deducting the amount of such mortgage from the price of the land, then the junior mortgage is entitled to priority over the senior.²

§ 1052. Presumption of deduction of amount of mortgage from consideration.—While, as a general proposition, the taking of a deed subject to a mortgage imposes no personal liability on the grantee, it raises the presumption that the grantee has purchased the property for what it was worth, less the amount of the encumbrances upon it. “The fair inference is, that the purchaser does not pay the vendor the full value of the property, but that

¹ Fowler v. Fay, 62 Ill. 375.

² Fowler v. Fay, 62 Ill. 375. A mortgagor may obtain his personal release from the debt, and a payment made by the mortgagor for his release will not be treated as a payment in partial satisfaction of the mortgage: Osborn v. Williams, 82 Iowa, 456.

the amount of the mortgage debt is reserved in his hands, as so much purchase money for the purpose of discharging the lien. In such case the land conveyed is as effectually charged with the amount of the mortgage as if the purchaser had expressly assumed its payment. As between the vendor and the purchaser of the equity of redemption, the land is the primary fund for the liquidation of the encumbrance.”¹ A mortgage was made upon certain real estate to a bank, and afterward the mortgagors made an assignment for the benefit of their creditors. The bank obtained a decree of foreclosure, making the assignee a party to the suit. The assignee believing that he could not realize anything from the property, and desiring to enable the bank to obtain control of the property at a date earlier than could be done under the foreclosure proceedings, proposed to certain officers of the bank to offer the property at public sale, on condition that assurance be given to him that a sum would be bid sufficiently large to pay the expenses of the advertisement and sale. The bank accepted this proposal, and the property was accordingly advertised for sale, subject to the mortgage and decree held by the bank. One of the trustees, acting for the bank, bid twenty dollars at the sale, the property was sold to him, and the assignee executed a deed to him therefor. The bank paid the amount of the bid, and the trustee to whom the deed was made executed a declaration of trust, stating that he held the property conveyed to him in trust for the bank. The property was afterward sold under the decree of foreclosure, leaving a deficiency of several thousand dollars. The bank thereupon gave the assignee notice that it claimed that the deficiency should be paid out of the assets in his hands. On the petition of the assignee an order was made satisfying the decree, on the ground that

¹ *Gayle v. Wilson*, 30 Gratt. 166; s. c. 5 Reporter, 667, per Staples, J. To render the grantee personally liable, he must have assumed the mortgage debt; retaining the amount of the mortgage from the purchase price is not sufficient: *Granger v. Roll* (S. D., Apr. 3, 1895), 62 N. W. Rep. 970.

the assignee, in his dealings with the bank, was authorized to suppose that it, by taking the deed to the property, would have no further claim against him.¹

§ 1053. Setting off mortgage against purchase money. In the absence of a special contract or some special circumstances attending the transaction, a purchaser who accepts a deed without covenants takes the land charged with the mortgage debt, and cannot keep it alive by taking an assignment of it to himself, and claim the right to set it off against the balance of the purchase price he may still owe his grantor.²

§ 1053 a. Benefit of collateral security.—A purchaser subject to a mortgage cannot claim the benefit of collateral security obtained by the mortgagee from the vendor after the execution of the mortgage, as the land is the primary fund for the payment of the debt, and the purchaser is not interested in other security afterward taken, but not constituting a part of the original transaction.³ The purchaser will not be allowed to share in other securities held by the mortgagee.⁴ Where a deed is made to a trustee reciting that he assumes a described mortgage, and he holds the title for the benefit of others who paid the consideration, each beneficiary, in case of a deficiency, is liable in proportion to his separate interest.⁵

§ 1054. Sale of equity of redemption on execution.—When the equity of redemption is sold on execution, the

¹ *East Saginaw Sav. Bank v. Grant*, 41 Mich. 101.

² *Atherton v. Toney*, 43 Ind. 211; *Bunch v. Grave*, 111 Ind. 351. When a suit is brought upon a promissory note, given to secure the price of land which the payee had agreed to convey to the maker by a quitclaim deed, it is not a good answer that the land, after the execution of the note, had been sold to discharge a lien upon it, which existed at the time of making the note: *Shuler v. Hardin*, 25 Ind. 386. See, also, *Dickson v. Williams*, 129 Mass. 182; 37 Am. Rep. 316; *Wedge v. Moore*, 6 Cush. 8, 10; *Jumel v. Jumel*, 7 Paige, 591; *Spengler v. Snapp*, 5 Leigh, 478; *Eaton v. Simonds*, 14 Pick. 98.

³ *Brewer v. Staples*, 3 Sandf. Ch. 579.

⁴ *Stevens v. Church*, 41 Conn. 369.

⁵ *Reynolds v. Dietz*, 34 Neb. 265; *Bear v. Koenigstein*, 16 Neb. 65.

purchaser is subrogated to all the rights, and becomes subject to all the disabilities of the mortgagor. The purchaser of the equity of redemption takes the land with the paramount lien of the mortgage resting upon it, the mortgage continuing to be as valid and operative as a security as it did when the equity of redemption was in the mortgagor. The land is the primary fund for the payment of the mortgage debt, and the purchaser cannot compel the mortgagor to pay it off.¹ The purchaser cannot contest the validity of the mortgage, and hold the estate free from encumbrances by proving that the mortgage was fraudulent.² By taking the property subject to the mortgage, the purchaser is as much estopped to deny it as if there had been a recital to that effect in his deed.³ The purchaser does not acquire any interest in other securities held by the mortgagee, and the principle as to marshaling securities does not apply to the case of a mortgagee and a subsequent purchaser of the equity of redemption.⁴

¹ *Lovelace v. Webb*, 62 Ala. 271; *Russell v. Allen*, 10 Paige, 249; *Vanderkemp v. Shelton*, 11 Paige, 28. See, also, *Heyer v. Prayn*, 7 Paige, 470; 34 Am. Dec. 355; *Funk v. Reynolds*, 33 Ill. 495; *Tice v. Annin*, 2 Johns. Ch. 128; *Stephens v. Church*, 41 Conn. 369.

² *Russell v. Dudley*, 3 Met. 147; *Lord v. Sill*, 23 Conn. 319; *Delaware & Hudson Canal Co. v. Bonnell*, 46 Conn. 9; *Waterman v. Curtis*, 26 Conn. 241.

³ *Russell v. Dudley*, 3 Met. 147. In that case Chief Justice Shaw said: "The purchase money must be understood to be the value of the estate, over and above the sum for which it is mortgaged. If he could afterward avoid that mortgage, and hold the whole estate, he might get it for a very inadequate consideration; he would get what the officer never intended to sell, to the manifest injury of the debtor and perhaps of the creditor. It would be injurious to the debtor, by taking the whole of his estate by force of a legal proceeding intended to convey to him the balance of the value of the estate, after paying the mortgage debt, leaving the debtor still personally liable for that debt. It would be injurious to the creditor if the actual proceeds of the sale should prove insufficient to pay the whole amount of his execution, as it would be giving to the purchaser the power of defeating the intermediate mortgage, which it is the privilege of the creditor alone to impeach for his own benefit; and which, if set aside, would leave the whole value of the estate to be applied to the satisfaction of the execution."

⁴ *Stevens v. Church*, 41 Conn. 369. Where no attempt has been

§ 1055. **Parol evidence to show grantee did not assume mortgage.**—When there is no fraud in the execution or delivery of a deed, a grantee who has accepted the deed by which he “assumes and agrees to pay” a certain mortgage on the premises, “and to save the grantor harmless therefrom,” cannot show by parol evidence that he made no such agreement and did not know that these clauses had been inserted in the deed. By accepting the deed the grantee took upon himself the duty of performing the agreement contained in the deed according to its terms.¹ A deed was executed to a woman as grantee, without her authority or knowledge, at the direction of her husband, who had the deed recorded. The deed contained a recital that the land conveyed was subject to a mortgage, “which the grantee assumes and agrees to pay.” Shortly after the registration of the deed she became aware that the land had been conveyed to her, and claimed to be its owner, but she never saw the deed itself, and knew nothing of what it contained until after the sale of the land by the mortgagee, when she repudiated the deed. It was held, however, that these facts would justify a finding that she had given her assent to the purchase, and also a ruling that the recital in the deed bound her.² And it is held that unless there is some evidence to the con-

made to proceed against the mortgagee in a foreclosure proceeding, the general rule is that the obligation of the purchaser is not merged, and the mortgagee may proceed to collect the deficiency in another action: *Washington Life Ins. Co. v. Marshall* (56 Minn. 250), 67 N. W. Rep. 658; *McRae v. Sullivan* (56 Minn. 266), 57 N. W. Rep. 659.

¹ *Muhlig v. Fiske*, 131 Mass. 110. “The defendant,” said the court, “having, by the delivery which the jury have found, accepted the deed of conveyance, and thereby obtained the estate which he afterward conveyed to a third person, and so made himself liable to the burden which, by the terms of the deed, he had assumed, could not (no fraud in the execution or delivery of the deed being suggested) impair the legal effect of his own act by oral evidence that he had never agreed to assume and pay the mortgage, nor authorized nor knew of the insertion of such an agreement in the deed. Such evidence, except so far as it tended to show that there had been no delivery of the deed, was therefore rightly excluded, independently of any question of pleading: *Coolidge v. Smith*, 129 Mass. 554; *Blyer v. Monholland*, 2 Sand. Ch. 478.”

² *Coolidge v. Smith*, 129 Mass. 554.

trary, proof of the record of a deed will raise the presumption that the title vested in the grantee, and that he became bound by a covenant in the deed to assume a mortgage.¹

§ 1056. **Purchaser on assuming mortgage is principal debtor.**—If the grantee undertakes to pay the mortgage he becomes the principal debtor, and the mortgagor a surety merely.² The mortgagee may maintain a personal action against the grantee who has assumed to pay the mortgage without foreclosing the mortgage or joining the mortgagee as a defendant in the action.³ An owner of real estate, who had given a trust deed to secure a loan, conveyed the property to another, subject to the encumbrance which the grantee in the deed agreed to assume. This grantee conveyed to another purchaser, and the latter to a third. It was held that the original mortgagor became simply a surety for the payment of the debt to the creditor, and had the right of paying the debt when it

¹ *Lawrence v. Farley*, 9 Abb. N. C. 371. See *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; 13 Am. Rep. 556; *Spaulding v. Hallenbeck*, 35 N. Y. 206; *Belmont v. Coman*, 22 N. Y. 438; 78 Am. Dec. 213. A covenant to pay a "mortgage" is a covenant to pay the debt which it secures: *Hine v. Myrick*, 60 Minn. 518; 62 N. W. Rep. 1125.

² *Burr v. Beers*, 24 N. Y. 178; 80 Am. Dec. 327; *Willson v. Burton*, 52 Vt. 394; *Rubens v. Prindle*, 44 Barb. 336; *Calvo v. Davies*, 73 N. Y. 211; 29 Am. Rep. 130; *Wales v. Sherwood*, 52 How. Pr. 413; *Trotter v. Hughes*, 12 N. Y. 74; 62 Am. Dec. 137; *Flagg v. Geltmacher*, 98 Ill. 293; *Belmont v. Coman*, 22 N. Y. 438; 78 Am. Dec. 213; *Crenshaw v. Thackston*, 14 S. C. 437; *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; *Marsh v. Pike*, 10 Paige, 596; *Marshall v. Davies*, 78 N. Y. 414; *Mutual Life Ins. Co. v. Davies*, 44 N. Y. Sup. Ct. 172; *Johnson v. Zink*, 52 Barb. 396; *Cornell v. Prescott*, 2 Barb. 16; *Fleishhauer v. Doeliner*, 9 Abb. N. C. 373; *Comstock v. Drohan*, 71 N. Y. 9; *Ayers v. Dixon*, 78 N. Y. 318; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; 13 Am. Rep. 556; *Willard v. Woosham*, 76 Va. 392; *Boardman v. Larrabee*, 51 Conn. 39; *Alt v. Banholzer*, 36 Minn. 57; *Dean v. Walker*, 107 Ill. 540; 47 Am. Rep. 467; *George v. Andrews*, 60 Md. 28; 45 Am. Rep. 706; *Figart v. Halderman*, 75 Ind. 564; *Ellis v. Johnson*, 96 Ind. 377; *Palmeter v. Carey*, 63 Wis. 426; *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547. And see *Lawrence v. Fox*, 20 N. Y. 268; *Curtis v. Tyler*, 9 Paige, 432; *Miller v. Thompson*, 34 Mich. 10.

³ *Burr v. Beers*, 27 N. Y. 178; 80 Am. Dec. 327.

became due, without releasing the subsequent purchasers, each of whom became an original promisor for the payment of the debt as a condition on which he received title; and further, that after such payment the original mortgagor might become the purchaser at the trustee's sale.¹ But an agreement on the part of a vendee in an executory contract to assume and pay a mortgage upon the land as a part of the consideration, is simply an agreement to indemnify the vendor against a judgment for any deficiency that may result on a sale under the mortgage. The mortgagee cannot avail himself of the agreement, if the contract of sale is rescinded before the commencement of an action to foreclose the sale.²

§ 1056 a. Purchaser's title not divested by nonpayment.—A deed containing an agreement that the grantee, as a part of the consideration, shall assume and pay a mortgage previously executed by the grantor, vests the title in the grantee, and the agreement to assume and pay the mortgage does not constitute a condition, a breach of which will cause the title to revest in the grantor. The grantee's title cannot be divested, or his right to the possession of the land conveyed be destroyed, by showing that he failed to pay the mortgage.³ Where the grantee assumes the payment of the mortgage note, the holder of the note can enforce it against him in a personal action.⁴ A deed executed by the grantee to another, in which the latter

¹ *Flagg v. Geltmacher*, 98 Ill. 293. A grantee assuming a mortgage is charged with notice that the interest coupons attached to the principal note provide that the principal note should become due at an earlier date for default on payment of interest, although the mortgage fails to state that fact: *Williams v. Moody*, 95 Ga. 8; 22 S. E. Rep. 230. Where a vendee agrees "to take up" certain mortgages if the mortgagee will accept the money, he is obligated to pay the principal with interest to maturity, if demanded by the mortgagee, and an offer to pay the principal and interest accrued to the time of the offer is insufficient: *Beverly v. Blackwood*, 102 Cal. 83.

² *Biddell v. Brizzolara*, 64 Cal. 354.

³ *Martin v. Splivalo*, 69 Cal. 611. See § 827, *ante*.

⁴ *Wayman v. Jones*, 58 Mo. App. 313.

assumes the mortgage, will not release the former from his liability.¹

§ 1057. Extension of time.—If the purchaser has assumed the payment of the mortgage, and he and the mortgagee, by an agreement between themselves, in which the mortgagor does not join, extend the time for the payment of the mortgage, the rule in most of the States is that the mortgagor, occupying, as he does, the relation of a surety, is discharged from all liability upon the mortgage.²

¹ *Corning v. Burton*, 102 Mich. 86; 62 N. W. Rep. 1040.

² *Calvo v. Davies*, 73 N. Y. 211; 29 Am. Rep. 130; *Metz v. Todd*, 36 Mich. 473; *Christner v. Brown*, 16 Iowa, 130; *Neimcewicz v. Gahn*, 3 Paige, 614; *Gahn v. Neimcewicz*, 11 Wend. 312. In the first case the court said: "The mortgagee, after the conveyance by Davies, could not deal with the grantee of the equity of redemption, to the prejudice of his right of subrogation, without discharging Davies from liability for the debt, either wholly or *pro tanto*. If, for example, he had, pursuant to an agreement with Leslie, without the consent of Davies, satisfied or released the lien of the mortgage, it is plain that he would thereby, as to Davies, have discharged the debt, at least to the extent of the value of the land. The rule that a mortgagee is bound, in dealing with his security, and with the bond, to observe the equitable rights of third persons, of which he has notice, has been frequently recognized: *Tice v. Annin*, 2 Johns. Ch. 125; *Halsey v. Reed*, 9 Paige, 446; *Stevens v. Cooper*, 1 Johns. Ch. 425; 7 Am. Dec. 499; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; 59 Am. Dec. 478. And the doctrine that a surety is discharged by dealings between the creditor and the principal debtor, inconsistent with the rights of the surety, has been applied, although the creditor did not know, in the origin of the transaction, that one of the parties was a surety, and also when, by an arrangement between two original joint and principal debtors, one of them assumed the entire debt, and this was known to the creditor: *Pooley v. Harradine*, 7 El. & B. 431; *Oriental Financial Corporation v. Overend, Gurney & Co. Law, R.*, 7 Ch. App. 142; *Millerd v. Thorn*, 56 N. Y. 402; *Colgrove v. Tallman*, 67 N. Y. 95; 23 Am. Rep. 90. We think it must be held, upon the authorities, that the rights of the parties in this case are to be determined by the rules governing the relation of principal and surety, and that if the dealings between the mortgagee and Leslie would have discharged Davies, if he had been originally bound as surety only, the action against him cannot be maintained: *Halsey v. Reed*, 9 Paige, 446; *Burr v. Beers*, 24 N. Y. 178; 80 Am. Dec. 327; *Flower v. Lance*, 59 N. Y. 603. That an agreement by the creditor with the principal debtor, extending the time for the payment of the debt, without the consent of the surety, discharges the latter, is established by numerous authorities, and the court

§ 1058. **Release of grantee.**—In a case where the grantee in the deed thus becomes the principal debtor, the mortgagor cannot release him, without, at the same time, releasing the mortgagor who is the surety. A mortgage was executed containing a clause, by which the mortgagor had the privilege of requiring from the mortgagee a release of any portion of the mortgaged property, at any time, upon making certain enumerated payments. Subsequently the mortgagor executed a deed of the property subject to the mortgage, which the grantee assumed and agreed to pay. Afterward an agreement was made between the grantee and the holder of the mortgage, without the knowledge or consent of the mortgagor, for the abrogation of this clause, relating to the release of certain portions of the property upon the making of the specified payments. The holder of the mortgage had notice of the deed and its covenants. The mortgage was foreclosed, and it was sought to hold the original mortgagor liable for the deficiency; but it was held that, inasmuch as the mortgagor was a surety, the release of the privilege referred to relieved him from liability.¹ But the mortgagee may discharge the mortgagor from personal liability without affecting his lien upon the land, or his claim against the grantee, assuming the debt.²

§ 1059. **Request of mortgagor to foreclosure.**—If the mortgagor considered as a surety, request the mortgagee at the maturity of the mortgage debt, to foreclose the mortgage debt, on the ground that the value of the property will then satisfy the mortgage, but may depreciate in

will not enter into the question what injury the surety has sustained: *Rees v. Berrington*, 2 Ves. Jr. 540; *Rathbone v. Warren*, 10 Johns. 587; *Miller v. McCan*, 7 Paige, 452." See, also, *Keller v. Ashford*, 133 U. S. 610; *Metz v. Todd*, 36 Mich. 473; *Home Nat. Bank v. Waterman*, 134 Ill. 461; *George v. Andrews*, 60 Md. 26; 45 Am. Rep. 706; *Union Life Ins. Co. v. Hanford*, 143 U. S. 187; *Cheeton v. Brooks*, 71 Md. 45; *Travers v. Dorr*, 60 Minn. 173; 62 N. W. Rep. 269.

¹ *Paine v. Jones*, 76 N. Y. 274. And see *Mutual L. Ins. Co. v. Davies*, 44 N. Y. Sup. Ct. 172.

² *Tripp v. Vincent*, 3 Barb. Ch. 613.

value, and the mortgagee neglects to comply with such request, the mortgagor will not be liable for a deficiency occasioned by such neglect.¹ But a request must be made. Mere neglect to proceed against the mortgagor will not discharge a person who has guaranteed the payment of a mortgage, although the value of the land has depreciated to such an extent as to be insufficient to pay the debt.²

§ 1060. View that relation of surety does not affect mortgagee.—In some courts the rule prevails that, although the mortgagor becomes a surety as between him and the grantee when the latter assumes the payment of the mortgage, yet that this relation does not arise as to the creditor. “Upon principle,” says Lewis, P. J., “it would seem that a clear distinction may be taken between a suretyship which is created with the express consent of the creditor—as in an original contract—and a suretyship which arises by operation of law in a later transaction, to which the creditor is not a party. In the former case the creditor is, by his own act, bound to recognize all the distinctive rights of the surety, whose obligation to him exists in no other capacity, from the beginning. He must, therefore, do nothing which may lessen the surety’s recourse or chances for indemnification, in the event of his having to pay the debt. But, in the latter case, he has voluntarily assumed no such duty. It becomes a

¹ *Remsen v. Beekman*, 25 N. Y. 552. Said the court: “In this case, when the primary fund for the payment of the debt was ample, when urged by the surety to collect it, and for years afterward, the creditor chose to let his loan lie, against the *quasi* surety’s expressed wish, because he considered it an advantageous mortgage investment, until the fund primarily liable for the debt has depreciated to a sum less than one-third of such debt, it would be wholly inequitable to charge a deficiency upon the surety caused purely by the creditor’s own conduct. The plaintiff refused to comply with the request of Beekman for the reason that he wished to continue the loan, showing by his conduct that he did not rely upon the surety. There would be no equity in allowing him to call upon the surety, when it is apparent that if he had complied with his request he would have secured his debt.” See, also, *Russell v. Weinberg*, 2 Abb. N. C. 422.

² *Hurd v. Callahan*, 9 Abb. N. C. 374.

question, then, whether the law can cast it upon him without his consent, and thus, in effect, alter the terms of his original contract. . . . He may, therefore, continue to hold the mortgagor as a principal debtor; and, while he so holds him, there can be no discharge of liability on the ground of indulgence to one who, for certain purposes not affecting the creditor, stands toward the original debtor in the relation of a principal to his surety.”¹ In a case in Iowa, it is likewise held that the relation of the grantor and mortgagor remains unchanged, by the assumption of the mortgage debt on the part of the grantee that both the grantor and grantee may, as to the mortgagee, be treated as principals, and that an extension of time by an agreement between the mortgagee and grantee will not alter this relation.² And the same rule prevails in New Jersey.³

§ 1061. **Comments.**—It seems unreasonable to change the relation existing between the mortgagor and mortgagee by a contract made by a purchaser with the mortgagor, to which the mortgagee is not a party. Between the mortgagor and the party assuming the payment of the mortgage, the relation of surety and principal may exist. But the rights of the mortgagee ought to be determined by the terms of his contract at the time of its execution, and these terms ought not, it seems to us, to be subsequently changed to his disadvantage without his consent. He cannot on any reasonable ground, in our opinion, be bound by any agreement which the mortgagor and the grantee may choose to make among themselves.

¹ Connecticut Mut. Life Ins. Co. v. Mayer, 8 Mo. App. 18. The court criticise the case of Calvo v. Davies, 73 N. Y. 211, 29 Am. Rep. 130, and say: “The conclusion reached in this decision seems to stand alone. The weight of authority elsewhere is altogether the other way.”

² Corbett v. Waterman, 11 Iowa, 86.

³ Huyler's Executors v. Atwood, 26 N. J. Eq. 504. And so in Michigan: Crawford v. Edwards, 33 Mich. 354. And see, also, Thompson v. Bertram, 14 Iowa, 476; Herbert v. Doussan, 8 La. Ann. 267; Waters v. Hubbard, 44 Conn. 340; James v. Day, 37 Iowa, 164; Fish v. Glover, 154 Ill. 86.

Let their rights and duties to one another be what they may, the mortgagee should be entitled to have his personal remedy against the mortgagor, to the same extent as if the property had not been sold subject to the mortgage. To deny him this right may be in many cases to deny him the means of satisfying the indebtedness due to him, to take away a right which he originally had, and which he has not agreed to relinquish. We, therefore favor the view that the relation of suretyship should not affect or involve in its consequences the mortgagee, so as to compel him to treat the mortgagor after the sale as he would have been compelled to deal with him had he originally assumed the relation of surety.

§ 1062. Purchaser of a part of the land.—An owner of land subject to a mortgage sold a part of it, the value of which was more than sufficient to pay the mortgage debt. A provision was inserted in the deed that the grantee should assume and pay the whole of the mortgage. Subsequently the owner conveyed the remaining part of the lot, with the understanding that the mortgage was to be paid by the former grantee, and afterward a new mortgage upon the portion of the lot first conveyed was taken by the mortgagee who had notice of these facts. Under these circumstances the court permitted the second grantee to maintain a bill to redeem the lot conveyed to him without contribution toward the debt secured by the first mortgage.¹ If the purchaser of a part of the land subject to a mortgage discharge it, he will be entitled to an account of the rents and profits, and to an assignment of the mortgage.² The purchasers of several parts of mortgaged property are obliged to contribute in proportion to the value of the parts respectively held by

¹ *Welch v. Beers*, 8 Allen, 151. See, also, *Iowa Loan and Trust Co. v. Mowery*, 67 Iowa, 113; *Hazlett v. Sinclair*, 76 Ind. 488; 40 Am. Rep. 254; *Miller v. Fasler*, 42 Minn. 366; *Johnson v. Walter*, 60 Iowa, 315; *Rugg v. Brainerd*, 57 Vt. 364.

² *Salem v. Edgerly*, 33 N. H. 46; *Champlin v. Williams*, 9 Pa. St. 341.

them, if the equities of such parties are equal.¹ As the grantees and all claiming under them undertake, when mortgaged lands are conveyed subject to a mortgage, that the land shall be the primary fund for the payment of such debt, the execution of a subsequent deed of a part of such land to the mortgagor does not relieve the remainder for its proportionate liability for such debt.²

§ 1063. Grantee's defense against mortgage.—A grantee, who in his deed has assumed the payment of a mortgage, is not permitted to contest its validity. He cannot, for instance, allege that the mortgage which he has assumed is usurious.³ Nor can the grantee show that the amount assumed by him is not due upon the mortgage.⁴ A pre-emptor of land borrowed a sum of money, and executed a mortgage on the land as security for the

¹ *Salem v. Edgerly*, 33 N. H. 46. Where the owner of land subject to a mortgage sells pieces successively, and the mortgagee releases the pieces last sold, if these pieces are of sufficient value to discharge the debt, such release, if the mortgagee had knowledge of the previous sales, will discharge the lien on the land previously sold: *Turner v. Sharpneck*, 164 Pa. St. 469; 44 Am. St. Rep. 624.

² *Weber v. Zeimet*, 30 Wis. 283. See, also, *Freeman v. Auld*, 44 N. Y. 50.

³ *Bearce v. Barstow*, 9 Mass. 45; 6 Am. Dec. 25; *Root v. Wright*, 21 Hun, 344; *De Wolf v. Johnson*, 10 Wheat. 367; *Ritter v. Phillips*, 53 N. Y. 586; *Frost v. Shaw*, 10 Iowa, 491. "The defense of usury," said the court in *Cramer v. Lepper*, 26 Ohio St. 59; 20 Am. Rep. 756, "is personal to the mortgagor, and cannot be set up by his grantee, who assumes in consideration of the grant to pay the claim of the mortgagee." See, also, *Busby v. Finn*, 1 Ohio St. 409; *Hartley v. Harrison*, 24 N. Y. 170; *Shufelt v. Shufelt*, 9 Paige, 137; 37 Am. Dec. 381; *Barthet v. Elias*, 2 Abb. N. C. 364; *Sands v. Church*, 6 N. Y. 347; *Cope v. Wheeler*, 41 N. Y. 303. And see *Union Bank v. Bell*, 14 Ohio St. 201; *Green v. Kemp*, 13 Mass. 515; 7 Am. Dec. 169; *Morris v. Floyd*, 5 Barb. 130.

⁴ *Kennedy v. Brown*, 61 Ala. 296; *Ritter v. Phillips*, 53 N. Y. 586; *Scarry v. Eldridge*, 63 Ind. 44; *Green v. Houston*, 22 Kan. 35; *Johnson v. Parmely*, 14 Hun, 398; *Crawford v. Edwards*, 33 Mich. 354; *Miller v. Thompson*, 34 Mich. 10; *Dean v. Walker*, 107 Ill. 540; 47 Am. Rep. 467; *Millington v. Hill*, 47 Ark. 301; *McConihe v. Faies*, 107 N. Y. 404; *Bond v. Dolby*, 17 Neb. 491; *Skinner v. Reynick*, 10 Neb. 323; 35 Am. Rep. 479; *Koch v. Losch*, 31 Neb. 625; *Fitzgerald v. Barker*, 85 Mo. 13; *Alt v. Banholzer*, 36 Minn. 57. See *American Nat. Bank v. Klock*, 53 Mo. App. 335.

sum borrowed. After entering upon the land, he conveyed it by deed to a purchaser, subject to the mortgage, the purchaser agreeing to pay the mortgage as a part of the purchase price. This deed was duly recorded, and, subsequently, the grantee conveyed the premises to a second grantee, with a covenant that the premises were free from all encumbrances, except as shown by the records, and the second grantee agreed with the first to pay the mortgage as a part of the consideration. It was held that the second grantee, in an action to foreclose the mortgage by the mortgagee, was estopped from showing the invalidity of the mortgage under the pre-emption laws of Congress.¹ A husband and wife executed a mortgage upon their homestead without complying with the provisions of the statute as to the waiver of the homestead right. Afterward, they conveyed the premises by deed, subject to the mortgage, the amount of which formed a part of the purchase price. The grantee, having obtained the premises by assuming the payment of the mortgage, and thus admitting its validity, was held to be estopped in an action to foreclose by the mortgagee, from setting up, as a defense, the omission to release the right of homestead.² When the grantee accepts a deed binding him to pay a mortgage, he cannot show in a foreclosure suit, for the purpose of contradicting the deed, that it was agreed between him and his grantor that the consideration was to be paid partly by labor, and that he was to be released from the deed of trust.³ The grantee, as long as he remains in the quiet and peaceable possession of the premises, cannot defend against the payment of the mortgage which he has assumed, because of a failure of title.⁴

¹ *Green v. Houston*, 22 Kan. 35.

² *Pidgeon v. Trustees of Schools*, 44 Ill. 501.

³ *Klein v. Isaacs*, 8 Mo. App. 568.

⁴ *Parkinson v. Sherman*, 74 N. Y. 88; 30 Am. Rep. 268. Said Miller, J.: "It is held that where a grantee of mortgaged premises takes a deed of the same subject to the mortgage, and thereby assumes to pay the mortgage, he is estopped from contesting the consideration and validity

§ 1064. **Part of consideration.**—The acceptance of a deed containing such a clause of assumption, is equivalent to a direction from the grantor to the grantee to pay the amount specified, as so much of the consideration, to the mortgagee. The grantee is liable for the amount he undertakes to pay, and cannot dispute the legal execution of the mortgage, or its amount as stated in the deed.¹ Although the grantee has not assumed the payment of the mortgage, yet when the deed has been made subject to the mortgage, and the amount has been deducted from the consideration, the grantee cannot contest the validity of the mortgage.² A mortgage was executed to A on land, which the mortgagor afterward sold, subject to the mortgage, to B, the grantee reserving from the purchase price sufficient to discharge it. But there was a prior mortgage on the same land to C, of which both A and B had no knowledge. When they learned of this prior mortgage, B gave A to understand that he would pay it off. B, however, permitted C to foreclose, and he, B, purchased the

of the mortgage: *Freeman v. Auld*, 44 N. Y. 50; *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; *Ritter v. Phillips*, 53 N. Y. 586; *Shadbolt v. Bassett*, 1 Lans. 121. The general rule is, that there must be an eviction before any relief can be granted, on the ground of a failure of title or consideration. So long as he remains in the peaceful and quiet possession of the premises, or until he surrenders possession of the same to a paramount title, the mortgagor or the purchaser who assumes the payment of the mortgage has no defense to the same. But where the mortgage debt is not deducted from the consideration or is a part of it, the grantee may contest the validity of the mortgage: *Sewing Machine Co. v. Emerson*, 115 Mass. 554; *Flanders v. Doyle*, 16 Ill. App. 508; *Purdy v. Coar*, 109 N. Y. 448; 4 Am. St. Rep. 491; *Bishop v. Felch*, 7 Mich. 371; *Baldwin v. Tuttle*, 23 Iowa, 66; *Wood v. Broadley*, 76 Mo. 23; 43 Am. Rep. 754; *Judson v. Dada*, 79 N. Y. 373; *Williams v. Thurlow*, 31 Me. 392; *Parker v. Jenks*, 36 N. J. Eq. 398; *Briggs v. Seymour*, 17 Wis. 255; *Thompson v. Morgan*, 6 Minn. 292. His only remedy is at law on the covenants in the deed: *Abbott v. Allen*, 2 Johns. Ch. 519; 7 Am. Dec. 554; *Bumpus v. Platner*, 1 Johns. Ch. 213; *Curtiss v. Bush*, 39 Barb. 661."

¹ *Miller v. Thompson*, 34 Mich. 10. And see *Ferris v. Crawford*, 2 Denio, 595; *Crawford v. Edwards*, 33 Mich. 354; *Haile v. Nichols*, 16 Hun, 37.

² *Freeman v. Auld*, 44 N. Y. 50; s. c. 37 Barb. 587; *Hardin v. Hyde*, 40 Barb. 455. But see *Hartley v. Tatham*, 2 Abb. N. Y. App. 333; s. c. 10 Bosw. 273. See *Foster v. Wightman*, 123 Mass. 100.

land at the foreclosure sale. It was held that A's mortgage was not extinguished by this foreclosure, and that he could enforce his lien against the land.¹

§ 1065. **Purchaser at execution sale.**— A purchaser at an execution sale of land which the owner had purchased under an agreement to pay and assume a mortgage upon it, succeeds to the rights of the owner, and is equally with him estopped from denying its validity.² A stockholder of a corporation obtained a judgment against it. There was a mortgage upon its property, of which he had knowledge. He caused to be sold under an execution issued by him upon his judgment, all the right, title, and interest of the corporation in and to the property that was mortgaged, "subject to whatever sum might be due upon the property by virtue of the mortgage." He bought the property at the sale for a very small sum, and it was held that he could not dispute the mortgage nor its validity.³ But if there are two mortgages upon the land, the purchaser is not estopped under the statute in Massachusetts from contesting the validity of the second mortgage, where the sheriff sells on execution "all the

¹ *Manwaring v. Powell*, 40 Mich. 371. The court, per Cooley, J., said of the grantee in the deed: "It is true that, having like complainant been ignorant of the Wabeke mortgage when he bought of Moody, the hardship of being compelled to pay that mortgage is as great upon him as it would be upon complainant; but that was one of the risks he assumed in his purchase. He now owns the land; and had complainant paid and taken up the Wabeke mortgage, he would have been entitled to tack it to his own, and foreclose for both, while on the other hand, if Powell had paid and taken it up, he would have been entirely without remedy against any one, except as the covenants in his deed from Moody might have afforded indemnity. And we do not think that the circumstance that he bought in the land at the foreclosure sale can help him under the circumstances. We are convinced from the evidence that he had given complainant to understand that he should pay off the Wabeke mortgage; and, under the circumstances, he was not at liberty to buy in the land to complainant's prejudice. We have no occasion to decide whether or not he might have done so had there been no such understanding."

² *Kennedy v. Brown*, 61 Ala. 296.

³ *Conkling v. Secor Sewing Machine Co.*, 55 How. Pr. 269.

right in equity" of the mortgagor to redeem the land from the mortgages, and conveys the same by his deed.¹

§ 1066. When grantee may show invalidity of mortgage.—If no deduction is made from the purchase price on account of the encumbrance, the grantee may contest the validity of the mortgage, having, in this case, the same right as the mortgagor himself.² Where a deed contains a covenant of warranty, and recites that the premises are subject to a mortgage, but excepts the mortgage from the covenant, the grantee may dispute the validity of the mortgage against the holder.³ If a person buys a tract of land with information from the grantor of the usurious character of a prior mortgage, and relies on being able to make that defense, he has the right to contest the validity of the mortgage on the ground of usury.⁴

¹ *Stebbins v. Miller*, 12 Allen, 591. Said the court: "When a creditor seizes and sells on execution a debtor's equity in mortgaged real estate, that which he obtains is the entire right of redemption in the premises which the debtor had therein liable to be taken by creditors. There must be a mortgage to justify a sale on execution; since unencumbered real estate cannot be so sold, but is liable only to be appraised and set off. Therefore, it was held in *Russell v. Dudley*, 3 Met. 147, that in the case of an estate subject to a single mortgage, the purchaser of the equity at the sheriff's sale was estopped to deny its existence and validity; because he bought only an equity of redemption, and if there were no mortgage there could be no such equity; and by establishing the invalidity of the mortgage, he would necessarily establish the invalidity of his own deed and title. Where, however, there are more mortgages than one, so that the debtor's estate is an equity of redemption, which the statute authorizes to be sold on execution, if any of the apparent encumbrances do not really exist, if they are fraudulent and void, or, though once valid, have been fully paid, the purchaser is entitled to redeem from the real encumbrances, and to contest such as are apparent only: *Gerrish v. Mace*, 9 Gray, 235."

² *Maher v. Lanfrom*, 86 Ill. 513; *Flanders v. Doyle*, 16 Ill. App. 508; *Wilkinson v. Doyle*, 16 Ill. App. 514.

³ *Weed Sewing Machine Co. v. Emerson*, 115 Mass. 554. See, also, *Flanders v. Doyle*, 16 Ill. App. 508; *Baldwin v. Tuttle*, 23 Iowa, 66; *Judson v. Dada*, 79 N. Y. 373; *Parker v. Jenks*, 36 N. J. Eq. 398; *Purdy v. Coar*, 109 N. Y. 448; 4 Am. St. Rep. 491; *Williams v. Thurlow*, 31 Me. 392; *Wood v. Broadley*, 76 Mo. 23; 43 Am. Rep. 754; *Briggs v. Seymour*, 17 Wis. 255; *Thompson v. Morgan*, 6 Minn. 292; *Cummins v. Wire*, 6 N. J. Eq. 73.

⁴ *Newman v. Kershaw*, 10 Wis. 333.

And it is held that the grantee under a quitclaim deed for one dollar may contest the mortgage of his grantor on the ground of usury, where there is no other evidence that the grantee had assumed the payment of the mortgage debt, or had agreed to have it paid out of the land.¹ A grantee taking a deed with covenants of warranty may prove a payment by the mortgagor, which decreases the amount of the encumbrance upon the land.²

§ 1067. Intention of grantee to assume should be clear.—To render the grantee personally liable to pay a

¹ *Ludington v. Harris*, 21 Wis. 239. The court, per Downer, J., said they were of the opinion, "both upon principle and authority, that a general conveyance of land on which there is a mortgage made by the grantor void for usury, gives to the grantee the right to set up the defense of usury; and that a quitclaim deed for the consideration of one dollar gives the same right to the grantee to avail himself of the defense of usury as any other could. The right to set up the defense by the grantee cannot be defeated by inadequacy of consideration, but only by showing an agreement on the part of the grantee, either to assume and pay the debt secured by the usurious mortgage, or that it should be paid out of the land. If the deed on its face conveys only the equity of redemption, or the land subject to the mortgage, then the grantee, by accepting the deed, agrees that the mortgage debt shall be paid out of the land. And if it appeared by competent evidence that the land was sold to the grantee for a consideration exceeding the amount mentioned in the mortgage, and the mortgage debt was actually deducted from the consideration agreed to be paid by the grantee, this would, as to him, render the land liable to the payment of the usurious mortgage. But no agreement to pay or take the land subject to the usurious mortgage should be inferred from the mere inadequacy of the consideration, or from the premises being conveyed by a quitclaim deed. The authorities, we think, lead to the conclusion, that if the purchaser acquired the interest in the estate which the mortgagor would have had if the conveyance by him to the purchaser had not been made, then the grantee is in a position to avail himself of the defense."

² *Williams v. Thurlow*, 31 Me. 392. And see, also, as to the right of the grantee to contest the validity of a mortgage, *Smith v. Cross*, 16 Hun, 487; *Pearsall v. Kingsland*, 3 Edw. Ch. 195; *Stevens' Institute v. Sheridan*, 30 N. J. Eq. 23. Where a deed recites that it is subject to a mortgage given to secure the payment of specific bonded indebtedness, and contains a covenant to pay all of the present indebtedness "above specified," the specific language will not be controlled by any following general terms in which the grantee undertakes to perform all the "lawful obligations" of the grantor. The effect of the specific covenants is not limited to lawful obligations: *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547.

mortgage upon the lands embraced in his deed, it should clearly appear that such was the intention of the parties. A mere statement in the deed that the conveyance is made subject to such mortgage is not sufficient to fix this liability upon him. To effect this result, the deed should contain some language clearly importing that an obligation is intended to be created by one party, and is knowingly assumed by the other, such as, "subject to payment of the mortgage," or that such mortgage "forms a part of the purchase money, which the grantee in the deed assumes to pay," or some other equivalent expression.¹ The grantee does not become personally liable to pay mortgages by accepting a deed, with full covenants, which recites a consideration of a certain amount, with a *habendum* clause, reciting that the grantee is to hold the land subject to four mortgages, which are described as amounting to a certain sum, which sum, it is stated, "has been estimated as a part of the consideration money in this conveyance, and has been deducted therefrom."² "Where

¹ Stebbins v. Hall, 29 Barb. 524. Bacon, J., said: "Whenever a party is thus sought to be charged with a duty primarily resting upon another, it must arise either from his express assumption or from an obligation which the law implies, and casts upon him, from the words of his contract or the language of his acts. This conclusion, I think, is borne out by the whole current of the authorities to which we were referred on the argument, and some to which no allusion was made. I am aware that in several reported cases the marginal notes state in general terms, and sometimes without any qualification, that where a mortgagor sells the mortgaged premises subject to the mortgage, the purchaser is bound in equity to pay off the mortgage. But in nearly every case, perhaps in all, where such a liability has been expressed, could we be furnished with the exact language employed in the conveyance, we should probably find that something more was added than the mere statement that the deed was subject to the mortgage." The learned justice then proceeds to examine a number of authorities in support of the conclusions which he had stated. See, also, Walker v. Goldsmith, 7 Or. 161; Lewis v. Day, 53 Iowa, 575; Dunn v. Rodgers, 43 Ill. 260; Strong v. Converse, 8 Allen, 557; 85 Am. Dec. 732; Foster v. Atwater, 42 Conn. 244; Tillotson v. Boyd, 4 Sand. 516; Trotter v. Hughes, 12 N. Y. 74; 62 Am. Dec. 137; Moore's Appeal, 88 Pa. St. 450; 32 Am. Rep. 469; Drury v. Tremont Improvement Co., 13 Allen, 168; Fowler v. Fay, 62 Ill. 375; Comstock v. Hitt, 37 Ill. 542; Winans v. Wilkie, 41 Mich. 264.

² Belmont v. Coman, 22 N. Y. 438; 78 Am. Dec. 213. See, also, Lang v. Caldwell, 13 Mont. 458; 34 Pac. Rep. 957.

the words inserted in the deed, and which it is claimed impose a legal obligation on the grantee to pay the existing encumbrances, are of doubtful meaning or ambiguous, evidence showing the value of the premises, or the agreed consideration therefor, and whether a sufficient, or any, part of the same was retained by the grantee for the purpose of paying the mortgage indebtedness, would be material as aids in the construction thereof.”¹

§ 1068. Intention to be gathered from the whole deed.—In arriving at the intention of the parties to the deed as to the assumption of a mortgage, the whole instrument must be examined, and any part which is repugnant to or inconsistent with the intent of the whole deed, as is manifested to a certainty by other parts, must be rejected or modified so as to conform to such intent. Thus A agreed to convey to B certain premises, and B directed A to execute the deed to C. A, in compliance with this direction, executed a deed of the property to C, and delivered it to B for C. The deed conveyed the land “subject to a certain mortgage made by A, which said mortgage the party hereto of the *first* part assumes and agrees to pay as part of the consideration hereinbefore expressed.” Subsequently C conveyed by deed this property to D, who assumed and agreed to pay such mortgage as a part of the consideration. It was held that B was C’s agent for the purpose of accepting the deed, and C was bound to perform any agreement contained therein, and the word

¹ *Winans v. Wilkie*, 41 Mich. 264, 266, per Marston, J. A covenant against encumbrances was followed by the language: “Except a mortgage of \$2,170, and one interest mortgage of \$195, both mortgages given to C, which mortgages of said second party accept and agree to pay.” It was held that this language, entirely unexplained by other evidence, was insufficient to show that the grantee assumed the mortgages: *Hopper v. Calhoun*, 52 Kan. 703; 39 Am. St. Rep. 363. But it might have been shown by proper pleadings and evidence that the mistake was due to the scrivener: *Hopkins v. Calhoun*, 52 Kan. 703; 39 Am. St. Rep. 363. Where there are no other words to show an assumption of a mortgage than that the land is purchased “subject to” a mortgage, the vendee will not be personally charged with its payment: *Walker v. Goodsill*, 54 Mo. App. 651.

"first" in the clause of assumption was construed to read and mean "second," by which construction an agreement was constituted on the part of the grantee to pay the encumbrance.¹

§ 1069. **Contemporaneous agreement.**—A clause absolute in its terms in the deed binding the grantee to pay a mortgage may be modified by a contemporaneous agreement. An owner of land conveyed it by deed, subject to two mortgages. The deed contained this clause: "Both of which mortgages, and the notes secured thereby, and the interest thereon, the said grantee, by the acceptance of this deed, assumes and agrees to pay, and save me and my legal representatives forever harmless therefrom, the same forming part of the consideration of this deed." At the same time at which this deed was executed the grantee agreed in writing under seal with the grantor to save the latter harmless from certain notes aggregating a certain sum, and to convey to the grantor, by good and sufficient deeds, at any time within one year, upon the payment of that sum, the land embraced in his deed, free from all encumbrances, except the mortgages mentioned in such deed. Afterward, and within the year, the land was sold under a power of sale contained in the second mortgage for an amount less than the mortgage. It was held that the duty imposed upon the grantee must be construed in connection with the terms of the agreement of reconveyance, and that the grantor could not maintain an action brought within the year against the grantee for the balance due on the second mortgage.²

¹ *Fairchild v. Lynch*, 42 N. Y. Sup. Ct. (10 Jones & S.) 265. Said the court (p. 278): "There was plainly a mistake of the pen. There is no ambiguity in the words, but there is a mistake. The manifest intent was that whoever was to pay the consideration agreed to pay the mortgage. Theresa Lynch was to pay it, and she was, by an error that happens often in speech, in writing, and in printing, designated as the party of the first part. There is no doubt as to who was meant to be designated."

² *Gaffney v. Hicks*, 124 Mass. 301. The agreement to assume is an original undertaking, and may be contained either in the deed, in a

§ 1070. Implying obligation on part of grantee.—

Doubtful or ambiguous expressions will not ordinarily be sufficient to make the grantee personally liable, as the language used in the deed is that of the grantor. The law will not imply an obligation on his part where such is not clearly the intention of the parties. A and B exchanged lands, the land conveyed by A being subject to two mortgages, one of ten thousand dollars, and the other of five thousand dollars. The deed described the land and specified mortgages, and contained this clause: "The above-described property is alone to be holden for the payment of both the above debts." The covenant against encumbrances, inserted in the deed, excepted "the above mortgages of fifteen thousand dollars, which are a part consideration of this deed." A was afterward compelled to pay the second mortgage, and brought suit against B to recover the amount paid, but the court held that the clause which we have quoted could not be given the construction that B assumed a personal obligation to pay the mortgages.¹

separate writing, or rest in parol: *Moore v. Booker*, 4 N. Dak. 543; 62 N. W. Rep. 607.

¹ *Hubbard v. Ensign*, 46 Conn. 576. Carpenter, J., who delivered the opinion of the court, said: "In considering this question it is important to ascertain the intentions of the parties. In this, as in other transactions, when that is discovered, effect will be given to it if it can be done consistently with the rules of law. We are looking now for evidence of that intention in the language of the deed. In interpreting that language, we are to place ourselves in the position of the parties as nearly as may be. The parties have agreed upon the terms of an exchange, and have come together to execute deeds and other writings to carry their agreement into effect. One thing agreed upon is, that the defendant should personally obligate himself to pay the two mortgages amounting to fifteen thousand dollars, and the scrivener is instructed to incorporate that agreement in the deed. We expect him to write in plain, unambiguous language substantially as follows: 'The grantee, by accepting this deed, agrees to pay both said mortgages, and indemnify and save the grantor harmless.' That expresses the intention of the parties fully, and leaves no room for question or doubt. That is a natural, obvious, and easy thing to do. But instead of that, he writes: 'The above-described property is alone to be holden for the payment of both of the above debts.' Is it to be supposed that any intelligent man, especially if he had the advice of an able and astute lawyer, would accept that as an evidence of such an agreement? In this

§ 1071. Grantee's liability for attorney's fee.—A grantee who, in the deed, has assumed the payment of a mortgage which contains a covenant that a reasonable attorney's fee shall be paid in case of foreclosure of the mortgage, becomes personally liable for the payment of the attorney's fee in the event of foreclosure. By assuming the mortgage he assumes all its incidents.¹

§ 1072. Assumption of mortgage under contract of sale, when deed made to another.—The agreement to assume the mortgage may be contained in an instrument separate from the deed. A person entered into a written contract for the purchase of a piece of real estate, agreeing to pay therefor, partly in cash and partly by assuming the payment of a mortgage on the premises. By the purchaser's request, the deed was made to his wife. The agreement of the vendee under the contract of purchase, to assume the mortgage, it was held, inured to the benefit of the owner of the mortgage, and the fact that the deed, at the vendee's request, was made to his wife, did not affect his liability.²

§ 1073. Grantee's verbal promise to assume.—It is not necessary that the promise of the grantee to assume the payment of an encumbrance as a part of the consideration for which the deed is made, should be in writing. A verbal promise to do so is valid, and equity will enforce it either at the instance of the grantor or the holder of the mortgage.³ A promise on the part of the grantor, made

connection, it must be borne in mind that the deed is his instrument, is being prepared under his instructions, and, assuming such a contract to have been made, he will have no difficulty in having it inserted in clear and intelligible language. The fact that he did not do so, but, in lieu thereof, had a clause inserted that will bear another meaning equally well, if not better, is pretty conclusive evidence that no such agreement was in fact made."

¹ Johnson v. Harder, 45 Iowa, 677.

² Pike v. Seiter, 15 Hun (22 N. Y. Sup. Ct.), 402.

³ Lamb v. Tucker, 42 Iowa, 118; Bolles v. Beach, 2 Zab. (22 N. J. L.) 680; 53 Am. Dec. 263; Putney v. Farnham, 27 Wis. 187; Merriman v. Moore, 90 Pa. St. 78; Wilson v. King, 23 N. J. Eq. 150; Tuttle v. Arm-

at the time of the delivery of a deed by him, to pay an assessment upon the property when due, if the grantee will accept the deed and pay the purchase money, is valid and binding, an agreement of this character not being merged in the deed, nor affected by the statute of frauds.¹ The consideration of a deed may always be inquired into, and an agreement to pay a mortgage is independent of the contract contained in the deed. It is in addition to the terms of the contract as embraced in the deed, and does not vary or contradict them.² As a question of proof,

stead, 53 Conn. 175; *Wright v. Briggs*, 99 Ind. 563; *Groce v. Jenkins*, 28 S. C. 172; *Indiana Yearly Meetings v. Haines*, 47 Ohio St. 423; *Burnham v. Dorr*, 72 Me. 198.

¹ *Remington v. Palmer*, 62 N. Y. 31. Miller, J., speaking for the court, said: "It is said that all agreements preceding the delivery of the deed were merged in the same. This position is not a sound one, for while all prior agreements may be merged in the deed when executed, it by no means follows that before the contract is fulfilled by delivery and acceptance of the deed, that conditions may not be made which are obligatory upon the parties. The deed being ready for delivery, and the plaintiffs ready to pay the money, they had a perfect right to exact, as a condition for fulfilling the contract, that the defendant should pay the assessment when it became due. This is not contradicting a written agreement by parol, but evidence of the terms upon which the money was paid and the conveyance delivered. As the agreement in regard to the consideration was made after the deed was executed and before delivery, there could be no merger of this agreement in the deed: *Murdock v. Gilchrist*, 52 N. Y. 242. It is urged that this agreement by Harris was void within the statute of frauds, because it related to lands and was not in writing. The agreement was executed and carried into effect by the payment of the money, and hence the defendant became liable to pay the assessment. He had reaped the benefit of the contract, and he cannot thus claim that he is not bound to pay what he agreed to pay because the agreement was not in writing. The statute of frauds has no application to an executed agreement, and is no defense in an action brought to recover the money which the party is bound by the contract to pay. Nor can it be said, I think, that the agreement was partially in writing and partially by parol, and therefore it is inoperative. This is, no doubt, the true rule in cases where there is a contract which by the statute of frauds is required to be in writing: *Wright v. Weeks*, 25 N. Y. 153. But where there is no written contract, and, as in this case, where a deed was delivered and the money paid under an agreement to pay an assessment when due, neither the rule referred to nor the statute of frauds has any application."

² See *Barker v. Bradley*, 42 N. Y. 316; 1 Am. Rep. 521; *Murray v.*

it has been held that the grantee's denial, under oath, that he assumed the mortgage, corroborated by the testimony of the scrivener, the consideration expressed in the deed, and the omission of a clause of assumption in it, will not be overcome by the testimony of two witnesses that the grantee admitted the assumption after the sale.¹ "Such a promise is not within the statute of frauds, because it is a promise implied by law from the acceptance of the deed, and because it is a promise to pay the promisee's own debt to another person."²

§ 1074. Acceptance of deed.—A grantee by accepting a deed which provides that he shall assume a mortgage, is as much bound as he would be if he had executed a special contract for that purpose. "The principle is well settled, that where one, by deed-poll, grants land and conveys any right, title, or interest in real estate to another, and where there is any money to be paid by the grantee to the grantor, or any other debt or duty to be performed by the grantee to the grantor, or for his use and benefit, and the grantee accepts the deed and enters on the estate,

Smith, 1 Duer, 413; *Bowen v. Kurtz*, 37 Iowa, 239; *Taintor v. Hemmingway*, 18 Hun (25 N. Y. Sup. Ct.), 458.

¹ *Conover v. Brown*, 29 N. J. Eq. 510.

² *Locke v. Homer*, 131 Mass. 93, 102; 41 Am. Rep. 199, per Gray, J. See, also, *Alger v. Scoville*, 1 Gray, 391; *Huborn v. Park*, 116 Mass. 541; *Goodwin v. Gilbert*, 9 Mass. 510; *Pike v. Brown*, 7 Cush. 133. In the case last cited the court said: "It was insisted that this promise, if it existed at all, was a promise to pay the debt of another, and so void by the statute of frauds, if not made in writing; also that it concerned real estate, and so was void under another clause of the same statute. We think neither objection tenable. Although the consideration of this promise was a conveyance of real estate, it was a consideration past and executed, and the promise remained a simple obligation to pay money. As to the other objection, that it was a promise to pay the debt of another, the substance of the contract with the plaintiff was on a consideration, moving from him, to pay his debt, for his benefit, and to exonerate him, and was no less a direct promise to the plaintiff, because, in the performance of it, it would satisfy a debt due to another." Where the deed recites the existence of a mortgage merely, a subsequent oral promise without consideration, made by the grantee to pay the mortgage, is insufficient to establish an agreement binding on him: *Green v. Hall*, 45 Neb. 89; 63 N. W. Rep. 119.

the grantee becomes bound to make such payment, or perform such duty, and not having sealed the instrument, he is not bound by it as a deed; but, it being a duty, the law implies a promise to perform it, upon which promise, in case of failure, *assumpsit* will lie.”¹ “Such an undertaking is a contract in writing, and the statute of limitations does not begin to run upon such a contract until the execution of the deed. Nor is it material that this contract is not signed by the grantee. The acceptance of the deed makes it a contract in writing binding upon the grantee, just as the acceptance by a lessee of a lease in writing signed by only the lessor makes it a written contract binding upon such lessee; and suit can be instituted upon it, and the same rights maintained, as though it were also signed by the grantee.”² A executed a deed-poll to B, and he, B, subsequently executed a deed to C, in which it was recited that the property was the same that was conveyed by A to B. A brought an action against B on a contract contained in their deed, and it was held that the deed executed by B to C was admissible to prove the acceptance by B of the deed from A.³

¹ Pike v. Brown, 7 Cush. 133, per Shaw, C. J.; Gaffney v. Hicks, 131 Mass. 124; Furnas v. Durgin, 119 Mass. 500; 20 Am. Rep. 341; Braman v. Dowse, 12 Oush. 227; Locke v. Homer, 131 Mass. 93; 41 Am. Rep. 199; Crawford v. Edwards, 33 Mich. 354; Schmucker v. Sibert, 18 Kan. 104; 26 Am. Rep. 765; Trotter v. Hughes, 12 N. Y. 74; 62 Am. Dec. 137; Finley v. Simpson, 2 Zab. (22 N. J. L.) 311; 53 Am. Dec. 252; Huyler v. Atwood, 26 N. J. Eq. 504; Fairchild v. Lynch, 46 N. Y. Sup. Ct. 1; Taylor v. Whitmore, 35 Mich. 97; Urquhart v. Brayton, 12 R. I. 169; Spaulding v. Hallenbeck, 35 N. Y. 204; Bishop v. Douglass, 25 Wis. 696; Dickason v. Williams, 129 Mass. 182; 37 Am. Rep. 316; Wales v. Sherwood, 1 Abb. N. O. 101; Klein v. Isaacs, 8 Mo. App. 568; Unger v. Smith, 44 Mich. 22; Miller v. Thompson, 34 Mich. 10; Carley v. Fox, 38 Mich. 388; Higman v. Stewart, 38 Mich. 523; Patton v. Adkins, 42 Ark. 197; Thompson v. Dearborn, 107 Ill. 87; Sparkman v. Gove, 44 N. J. L. 252.

² Schmucker v. Sibert, 18 Kan. 104, 111; 26 Am. Rep. 765; Ricard v. Sanderson, 41 N. Y. 179; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35; 13 Am. Rep. 556.

³ Locke v. Homer, 131 Mass. 93; 41 Am. Rep. 199. This agreement of assumption inures to the benefit of the mortgagee: Thompson v. Bertram, 14 Iowa, 476; Corbett v. Waterman, 11 Iowa, 86; Lennig's Estate, 52 Pa. St. 135, 138; Hoff's Appeal, 24 Pa. St. 200; Burr v. Beers, 24 N. Y.

§ 1075. **Mistake in deed.**—If the scrivener by mistake inserts a clause in the deed binding the grantee to assume a mortgage, where neither of the parties intended to place this liability upon the grantee, and did not know of the insertion of this clause, the mortgagee cannot avail himself of it.¹

§ 1076. **Acceptance by agent.**—If the agent has power to accept the deed for the principal, the same rule as to assumption, of course, applies. The grantee named in the deed is bound by an acceptance on the part of an agent duly constituted with power to accept the deed for his principal.²

§ 1077. **Deed without grantee's knowledge.**—The reason that a grantee is bound by accepting the deed is, that he cannot accept the benefit without at the same time accepting the burden. If he retains the deed and acquires the title, he takes it subject to such restrictions, and on such conditions, as the grantor has seen fit to impose. But if the deed is made without the grantee's knowledge or consent, he naturally cannot be held bound by an obligation which the grantor desired to impose, but which the grantee never agreed to assume. In such a case the grantee is not bound by a clause of assumption, when he repudiates the deed as soon as he learns of its existence.³

178; 80 Am. Dec. 327; *Blyer v. Monholland*, 2 Sand. Ch. 478; *Converse v. Cook*, 8 Vt. 164; *Halsey v. Reed*, 9 Paige, 446; *King v. Whitely*, 10 Paige, 465; *Curtis v. Tyler*, 9 Paige, 432.

¹ *Stevens' Institute of Technology v. Sheridan*, 30 N. J. Eq. 23.

² *Fairchild v. Lynch*, 42 N. Y. Sup. Ct. 265.

³ *Stevens' Institute of Technology v. Sheridan*, 30 N. J. Eq. 23; *Cordts v. Hargrave*, 29 N. J. Eq. 446; *Culver v. Badger*, 29 N. J. Eq. 74. Where a purchaser took a deed in the name of another without his knowledge, the deed containing a stipulation that the grantee assumed the mortgage, and the latter when informed of the facts procured a release from the vendor, it was held that he was not liable on the covenant to the mortgagee, who had not accepted it before its release, and who had in the meantime become entitled to no equities: *Gold v. Ogden*, 61 Minn. 88; 63 N. W. Rep. 266.

§ 1078. **Grantee's implied promise to indemnify grantor.**—Notwithstanding that the grantee has not made any agreement to pay a mortgage upon the property, yet if the mortgage forms a part of the consideration for which the land is purchased, the law implies a promise, from the nature of the transaction, on the part of the grantee to indemnify the grantor. "It may be laid down as a general rule that a purchaser who buys, subject to a subsisting mortgage, and the mortgage debt forms a part of the price or consideration which he is to pay, and which he accordingly assumes, and he takes his deed subject to the mortgage and enters into the possession of the premises, is, in equity, bound to indemnify his grantor against the mortgage debt, although he enters into no bond or express covenant to that effect; and if he should leave his grantor to pay off the mortgage, it appears to me that he would be personally liable in an action at law by his grantor for the money so paid. It is true, he may not be liable personally to the mortgagee without something passing between them. If there should have been an express promise to the mortgagee, by the purchaser, to pay the debt, I do not see why there would not be a sufficient consideration to support such a promise."¹

¹ The Vice-Chancellor in *Dorr v. Peters*, 3 Edw. Ch. 132; *Klapworth v. Dressler*, 2 Beasl. (13 N. J. Eq.) 62; 78 Am. Dec. 69; *Cornell v. Prescott*, 2 Barb. 16; *Stevenson v. Black*, 1 N. J. Eq. (Sax.) 338; *Townsend v. Ward*, 27 Conn. 610; *Flagg v. Thurber*, 14 Barb. 196; *Moore's Appeal*, 88 Pa. St. 450; 32 Am. Rep. 469; *Marsh v. Pike*, 1 Sand. Ch. 210; *Thompson v. Thompson*, 4 Ohio St. 333; *Blyer v. Monholland*, 2 Sand. Ch. 478; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *Scott v. Featherston*, 5 La. Ann. 306; *Wood v. Smith*, 51 Iowa, 156; *Hartshorne v. Hartshorne*, 2 N. J. Eq. (1 Green) 349; *Schlatre v. Greaud*, 19 La. Ann. 125; *Ferns v. Crawford*, 2 Denio, 595.

In *Thompson v. Thompson*, 4 Ohio St. 333, 349, *Thurman, C. J.*, says: "It seems to be a well-settled principle that the purchaser of an encumbered estate, if he agree to take it subject to the encumbrance, and an abatement is made in the price on that account, is bound to indemnify his grantor against the encumbrance, whether he expressly promise to do so or not, a promise to that effect being implied from the nature of the transaction: *Tweddell v. Tweddell*, 2 Brown Ch. 154, margin; *Woods v. Huntingford*, 3 Ves. Jr. (Sumner's ed.) 132, margin; *Waring v. Ward*,

§ 1079. **Extent of grantee's liability.**—The grantee's liability in the case mentioned in the preceding section does not extend beyond the value of the property. He may, whenever he pleases, surrender the property in satisfaction of the encumbrance. "If he would retain and enjoy the premises, then he must pay off the encumbrance, and unite the legal title with his equitable interest. He may, therefore, safely be said to be liable to the extent of the value of the premises, and not beyond it. He takes them, it is true, *cum onere*, but may relinquish them *cum onere*."¹

§ 1080. **Release of covenant against encumbrances by grantee's subsequent assumption.**—A deed may be made subject to a mortgage, and may contain a general covenant against all encumbrances except the specified mortgage, and though the consideration expressed in the deed may be simply the value of the equity of redemption, still, if a part of the true consideration was that the grantee should pay the mortgage debt, it becomes his duty, as between him and his grantor, so to discharge it. A portion of a large lot of land subject to a mortgage was conveyed by the owner, who executed a deed with covenants of warranty against the mortgage. The grantee, some time afterward, made an offer for the purchase of the residue, at a specified price, and in his offer agreed to assume the debt secured by the mortgage, and to pay the remainder in money. On the acceptance of this offer the

7 Ves. Jr. (Sumner's ed.) 337, margin; *Earl of Oxford v. Lady Rodney*, 14 Ves. Jr. (Sumner's ed.) 423, margin."

¹ *Tichenor v. Dodd*, 3 Green Ch. (4 N. J. Eq.) 446, 454. In *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650, 655, it was said: "If the purchaser buys the mere equity of redemption, he is liable to the extent of the lands purchased and no farther, and he will be discharged on releasing the lands." And see, also, *Mount v. Van Ness*, 33 N. J. Eq. 262; *Cumberland v. Codrington*, 3 Johns. Ch. 229; 8 Am. Dec. 492. Where the grantor was not liable for the mortgage, the recital in a deed that the land is subject to a mortgage, which the grantee assumes and agrees to pay as a part of the purchase price, will not make the grantee personally liable for the mortgage debt: *Carrier v. United Paper Co.*, 73 Hun, 287.

owner executed a deed, which conveyed the land subject to the mortgage, and named an amount as consideration which was simply the value of the equity of redemption. This second deed also contained a covenant against encumbrances, except the mortgage we allude to. Under these circumstances, it became the duty of the grantee to pay the mortgage debt, and the grantor was released from the covenant contained in his first deed against the mortgage.¹

§ 1081. When grantee is a married woman.—By the statutes of many, if not most of the States, as incidental to her right to acquire property and hold it for her sole and separate use, a married woman may buy property upon credit, and enter into a valid obligation to pay the purchase price. When, therefore, as a grantee in a deed, she assumes and agrees to pay a mortgage upon the property, she is personally liable for the mortgage debt.² “The law, in giving married women the right to acquire and hold land, did not intend that their capacity to make contracts to secure the purchase money should be so limited and restricted that they could get the land without paying for it. Whether they secure the payment of the purchase money by bond and mortgage, note, or contract to assume the payment of a mortgage, it is a contract they have a capacity to make, and must be enforced.”³

¹ *Drury v. Tremont Improvement Co.*, 13 Allen, 168. When the deed is made subject to a mortgage and the amount is deducted from the purchase price, with the understanding that the grantee shall pay it, the mortgage should be made an exception in the covenants, else it may be said that the grantor covenanted against the encumbrance, and thereby it became his duty to pay it: *Estabrook v. Smith*, 6 Gray, 572; 66 Am. Dec. 445. That the encumbrance was intended to be excepted from the operation of the covenants cannot be shown by oral evidence, because such evidence would vary the terms of the deed: *Spurr v. Andrew*, 6 Allen, 420. See *Harlow v. Thomas*, 15 Pick. 66.

² *Cashman v. Henry*, 75 N. Y. 103; 31 Am. Rep. 437; *Huyler v. Atwood*, 26 N. J. Eq. 504; s. c. 28 N. J. Eq. 275; *Vrooman v. Turner*, 8 Hun, 78; s. c. 69 N. Y. 280; 25 Am. Rep. 195; *Ballin v. Dillaye*, 37 N. Y. 35. But see *Kitchell v. Mudgett*, 37 Mich. 81.

³ *Huyler v. Atwood*, 26 N. J. Eq. 504, 506, per the Vice-Chancellor.

But if the deed is made to a married woman without her consent and is never delivered to her, she is not bound by a clause in the deed in which it is recited that she assumes the payment of a mortgage upon the property described in the deed.¹

§ 1082. **Legislation in New York.**—In New York, the common-law restrictions placed upon the power of a married woman to purchase property, and to bind herself by agreements, have, by statute, been very greatly if not entirely removed. The court of appeals of that State, in a somewhat recent case, review the legislation upon the subject of the capacity of a married woman to bind herself by contract, and particularly with reference to her power to assume the payment of a mortgage, by accepting a deed in which she is named as grantee, and in the language of Mr. Justice Andrews, who delivered the opinion of the court, say: "It will be observed that these statutes confer upon a married woman the broadest and most comprehensive powers over her separate real and personal property. Her power of disposition is absolute and unqualified. She may sell or give it away. She may enter into any contract in respect to her separate real property 'with the same effect and in all respects as if she were unmarried,' and this court has held that, as incident to her separate ownership, she is liable for torts committed in its management, and for the fraud of her agent in dealing with third persons in respect to it."² She may engage in business and incur the most dangerous, and even ruinous, liabilities in its prosecution, and they will be enforced against her to the same extent as if she was unmarried. She is no longer regarded as under the tutelage of the court, but the new legislation assumes that she is capable of managing her own interests. . . . The conclusion is that under the statutes as they now exist, a married woman, as incident to her right to acquire real and per-

¹ *Culver v. Badger*, 29 N. J. Eq. 74.

² Citing *Rowe v. Smith*, 45 N. Y. 230; *Baum v. Mullen*, 47 N. Y. 557.

sonal property by purchase, and hold it to her sole and separate use, may purchase property upon credit, and bind herself by an executory contract to pay the consideration money, and that her bond, note, or other engagement given and entered into to secure the payment of the purchase price of property acquired and held for her separate use, may be enforced against her in the same manner and to the same extent as if she was a *feme sole*, and that her liability does not depend upon the proof or existence of special circumstances, but is governed by the ordinary rules which determine the liability of persons *sui juris* upon their contracts.”¹

§ 1083. **Agreement for assumption in unusual place in deed.**—A clause binding the grantee to pay a mortgage was not written in its usual place in the deed, at the end of the description of the property, but was contained among the covenants, a part of the deed where such a clause is very seldom found. The grantee examined the deed and expressed his satisfaction with it, but was not aware that it contained this clause. It was not a part of the agreement for the purchase of the property that the grantee should personally assume the payment of the mortgage. At the end of the description of the property there was a statement that the property was conveyed subject to the mortgage, but no language importing that the grantee assumed its payment. When he subsequently discovered that his deed contained this clause, he went to the agent of the grantor through whom he had purchased the property and complained of it, and then declared to him that he would not be bound by it, and soon afterward he made the same declaration to the grantor. He offered to surrender the deed on a return of the consideration, and on the grantor stating that he was unable to make the return, he offered to surrender the deed for a small

¹ *Cashman v. Henry*, 75 N. Y. 103; 31 Am. Rep. 437. See *Ballin v. Dillaye*, 37 N. Y. 35. But see *Yale v. Dederer*, 18 N. Y. 265; 72 Am. Dec. 503; 22 N. Y. 450; 78 Am. Dec. 216.

sum, which offer the grantor refused to accept. The mortgagee was not allowed to derive any advantage from the clause of assumption.¹

§ 1084. Verbal agreement that grantor should advance money.—A verbal agreement inconsistent with the terms of the deed cannot be enforced. A and B made an exchange of certain real estate. In the deed from A to B, a clause was inserted that the deed was subject to a mortgage described in the deed, "which said mortgage the said party of the second part hereby agrees to pay." B paid the amount of the mortgage, and brought an action against A to recover the amount so paid, in accordance with the contract under which the exchange was made, by which it was claimed that A, the grantor, agreed to furnish the money to pay the mortgage. But the alleged verbal agreement was held to be inconsistent with the terms of the deed, and the grantee was not allowed to recover upon it against the grantor.²

§ 1085. Fraudulent representations of grantor as to title.—If the grantor had no title to the property, and the grantee was induced to take a deed, and to assume the payment of a mortgage by the false and fraudulent representations of the grantor as to his title, these matters constitute a good defense in an action by the mortgagee against the grantee, to recover the amount of the mortgage.³

§ 1086. Mistake in description.—If the premises are not correctly described in the deed, a grantee, who has accepted a deed by which he assumes the payment of a mortgage, cannot free himself from liability on the ground that by reason of the mistake he acquired no legal title, where by virtue of his deed he obtained possession of the proper property, and the right to have the

¹ Bull v. Titsworth, 29 N. J. Eq. 73.

² Unger v. Smith, 44 Mich. 22.

³ Benedict v. Hunt, 32 Iowa, 27.

error rectified, but instead of taking the proper course to accomplish this, allowed the premises to be fraudulently conveyed and delivered to a third person, for the purpose of cutting off the mortgage.¹

§ 1087. **Intermediate grant subject to first mortgage.** In the absence of any stipulation in the deed that the grantee shall assume and pay a mortgage, a statement in the deed from an intermediate holder of a part of the premises covered by a mortgage, that the grant is subject to such mortgage, will not cause the mortgage to be a specific charge upon the portion conveyed by such deed, so as to affect the equities existing between second and third mortgagees upon other portions of the encumbered premises.²

§ 1088. **Collusion of grantee with mortgagee.**—Where the grantee takes the land subject to a mortgage, but does not enter into a personal covenant to pay the encumbrance, the grantor thus remaining liable for a deficiency after a foreclosure sale, and where the grantee by collusion with the mortgagee purchases at a foreclosure sale the land for a sum much below its real value, and less than the amount of the mortgage, the sale may, on the motion of the grantor, be set aside, if this be necessary for the protection of his interests, and the grantor may avail himself of the legal liability for the deficiency of this collusion as an equitable defense.³

¹ Crawford v. Edwards, 33 Mich. 354. And see Comstock v. Smith, 26 Mich. 306.

² Slater v. Breese, 36 Mich. 77. "The language," said the court, "neither expressed nor implied any assumption by the grantees of the payment of the mortgage in suit, nor any intention that the particular interest granted should be considered as charged thereafter with the whole amount of the old mortgage, in preference to the other property, and there was nothing in the situation of Spaulding or Mrs. Smith to influence them to desire anything of that kind. They were not original mortgagors, but intermediate holders of a portion of the mortgaged premises, and were never liable except in respect to the land. The only reasonable supposition is that the real purpose of the statement in the deeds was to except the named encumbrances from the covenants."

³ Cleveland v. Southard, 25 Wis. 479.

§ 1089. **Personal liability of grantor.**—If the grantor was not personally liable to pay the debt, the mortgagee, it is held in some of the States, cannot take advantage of an assumption to pay his mortgage contained in a deed to a subsequent grantee, on the ground that the mortgagee's right to relief does not depend upon any original equity existing in himself, but upon the right of the mortgagor against his grantee, to which right the mortgagee succeeds, and that when the grantor was not himself liable he does not become a surety, and that it is necessary that he should be a surety to enable the mortgagee to avail himself of the agreement between the surety and principal.¹ In cases of this kind it is considered that the grantee does not become personally liable through the grantor to the holder of the mortgage to pay the debt to him. It results as a general rule, therefore, that a prior mortgagee cannot enforce any personal liability upon a subsequent mortgagee where the agreement to assume a mortgage is contained in a mortgage.² This rule is not changed by the fact that the assumption of the prior mortgage is contained in an absolute deed intended as a mortgage.³ In several of the States a mortgagee may enforce the promise of a grantee to assume the payment of a mortgage as if it had been made to him directly.⁴

¹ *Norwood v. De Hart*, 30 N. J. Eq. 412; *King v. Whitely*, 10 Paige, 465; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *Trotter v. Hughes*, 12 N. Y. 74; 62 Am. Dec. 137; *Mount v. Van Ness*, 33 N. J. Eq. 262; *Crowell v. Currier*, 27 N. J. Eq. 152. See *Johnson v. Harder*, 45 Iowa, 677; *Anthony v. Herman*, 14 Kan. 494; *Ream v. Jack*, 44 Iowa, 325; *Rogers v. Herron*, 92 Ill. 583; *Ross v. Kennison*, 38 Iowa, 396.

² *Garnsey v. Rogers*, 47 N. Y. 233; 7 Am. Rep. 440.

³ *Garnsey v. Rogers*, 47 N. Y. 233; 7 Am. Rep. 440; *Gaffney v. Hicks*, 131 Mass. 124; *Arnaud v. Grigg*, 29 N. J. Eq. 482. But see *Ricard v. Sanderson*, 41 N. Y. 179.

⁴ *Thorpe v. Keokuk Coal Co.*, 48 N. Y. 253; *Lawrence v. Fox*, 20 N. Y. 268; *Campbell v. Smith*, 8 Hun, 6. The doctrine that when a person makes a promise for the benefit of a third person, though at one time questioned, now generally prevails: *Lamb v. Tucker*, 42 Iowa, 118; *Bassett v. Hughes*, 43 Wis. 319; *Miller v. Winchell*, 70 N. Y. 437; *Burr v. Beers*, 24 N. Y. 178; 80 Am. Dec. 327. See, also, *Ross v. Kennison*, 38 Iowa, 396; *Moses v. Dallas Dist. Ct.*, 12 Iowa, 139; *Hand v. Kennedy*,

But notwithstanding this rule, it is necessary that the grantee be personally liable upon the mortgage, which the grantee has assumed, to enable the holder of the mortgage to enforce the liability of the grantee upon his covenant.¹

§ 1090. In Pennsylvania it is held that although the grantor may not be personally liable, yet if the grantee assume the payment of a mortgage, the mortgagee may enforce this liability against him. A conveyed land to B "under and subject" to the payment of a mortgage to C. The deed under which A held contained no clause that it was "under and subject" to a mortgage. C brought an action against B to recover the amount of the mortgage, and offered to prove that B, when he accepted the deed from A, made an express agreement that he would assume the payment of the mortgage, and that the mortgage formed part of the consideration. The lower court held that because the grantor was under no obligation to pay the mortgage, his grantee was not liable upon his promise. But the supreme court said: "This was clearly error. The consideration was the price of the land. It was nothing to Cochran's vendees what the former did with the purchase money. He saw proper to apply a portion of it to the payment of the mortgages, which bound the land conveyed, although they imposed no personal liability upon him. A vendor may direct how the purchase money shall be paid. He may reserve it to himself, donate it to a public charity, or may make such other disposition of it as may best meet his views, and if his vendee agrees to pay it according to such directions, he cannot set up as a defense that his vendor was under no duty to apply it in such manner."²

83 N. Y. 149; *Corbett v. Waterman*, 11 Iowa, 86; *Fitzgerald v. Barker*, 70 Mo. 685; *Heim v. Vogel*, 69 Mo. 529; *Center v. McQuesten*, 18 Kan. 480; *McDowell v. Laev*, 35 Wis. 171; *Scott v. Gill*, 19 Iowa, 187.

¹ *Vrooman v. Turner*, 69 N. Y. 280; 25 Am. Rep. 195. See *Real Estate Trust Co. v. Balch*, 45 N. Y. Sup. Ct. 528.

² *Merriman v. Moore*, 90 Pa. St. 78, per Paxon, J. For cases that, as a general principle, a promise by one to pay the debt of another cannot be directly enforced by the creditor, see *Mellen v. Whipple*, 1 Gray, 317;

§ 1091. Enforcing grantee's promise before payment by grantor.—When the grantee has assumed the payment of a mortgage, the grantor may maintain an action on this promise without first having paid the debt which the grantee assumed and agreed to pay.¹ Mr. Justice Day says that the following doctrines will be found to underlie the authorities: "That if a condition or promise be only to indemnify and save harmless a party from some consequence, no action can be maintained until actual damage has been sustained by the plaintiff. But if the covenant or promise be to perform some act for the plaintiff's benefit, as well as to indemnify and save him harmless from the consequences of nonperformance, the neglect to perform that act is a breach of contract, and will give an immediate right of action."² In a case in Maine, A mortgaged a tract of land to B, and subsequently conveyed the same land to C by a deed of warranty, thus acknowledging that the consideration was paid. A received C's note and mortgage for part of the

Prentice v. Brimhall, 123 Mass. 291; Second Nat. Bank v. Grand Lodge, 98 U. S. 123; Gautzert v. Hoge, 73 Ill. 30; Crowell v. Currier, 27 N. J. Eq. 152; Crowell v. Hospital of St. Barnabas, 27 N. J. Eq. 650; Exchange Bank v. Rice, 107 Mass. 37; 9 Am. Rep. 1; Coffin v. Adams, 131 Mass., 133; Locke v. Homer, 131 Mass. 93; 41 Am. Rep. 199; Pettee v. Peppard, 120 Mass. 522; Brewer v. Dyer, 7 Cush. 337; Bohanan v. Pope, 42 Me. 93; Motley v. Manufacturers' Ins. Co., 29 Me. 337; 50 Am. Dec. 591; Klapworth v. Dressler, 13 N. J. Eq. 62; 78 Am. Dec. 69; Stuart v. Worden, 42 Mich. 154; Booth v. Connecticut Mut. Life Ins. Co., 43 Mich. 299; Unger v. Smith, 44 Mich. 22; Higman v. Stewart, 38 Mich. 513; Hicks v. McGarry, 38 Mich. 667. For cases *contra*, see Merriam v. Moore, 90 Pa. St. 78; Urquhart v. Brayton, 12 R. I. 169. And see, also, Justice v. Tallman, 86 Pa. St. 147; Hoff's Appeal, 24 Pa. St. 200; Townsend v. Long, 77 Pa. St. 143; 18 Am. Rep. 438.

¹ Locke v. Homer, 131 Mass. 93; 41 Am. Rep. 199; Brewer v. Worthington, 10 Allen, 329; Furnas v. Durgin, 119 Mass. 500; 20 Am. Rep. 341; Foster v. Atwater, 42 Conn. 244; Wilson v. Stilwell, 9 Ohio St. 467; 75 Am. Dec. 477; Valentine v. Wheeler, 122 Mass. 566; Stout v. Folger, 34 Iowa, 71; 11 Am. Rep. 138; Gregory v. Hartley, 6 Neb. 356; Snyder v. Summers, 1 Lea (Tenn.), 534; 27 Am. Rep. 778; Gaffney v. Hicks, 124 Mass. 301; Fiske v. Tolman, 124 Mass. 254; 26 Am. Rep. 659; Cilley v. Fenton, 130 Mass. 323. And see Braman v. Dowse, 12 Cush. 227; Belloni v. Freeborn, 63 N. Y. 683; Lathrop v. Atwood, 21 Conn. 117.

² In Stout v. Folger, 34 Iowa, 71, 74; 11 Am. Rep. 138.

consideration, and left the balance in the hands of C, who promised to pay the same to B, and take up A's note and mortgage. C, however, neglected to do this, and the note and mortgage to B remained unpaid. The court declared, however, that as the note and mortgage had not been taken up, A could not recover the money placed in the hands of C, but only nominal damages.¹

§ 1092. Discharge of mortgage by grantor.—Where a grantee of land subject to a mortgage takes a bond from the grantor that the latter will keep the former harmless from a second mortgage, and will cause it to be assigned to him within six months, the grantee is entitled upon a failure to receive such assignment within six months, to maintain an action, even after the foreclosure of the first mortgage, and, in case the property is not worth more than the aggregate of the two mortgages, to recover the difference between the value of the land and the amount due on the first mortgage.² Where the grantor has executed a warranty deed, and has covenanted to pay off a mortgage upon the land conveyed, he cannot, by allowing the mortgage to be foreclosed and redeeming the land, take the title to himself. A conveyed to B a portion of a lot on which there was a mortgage, and then permitted the mortgage to be foreclosed upon the whole lot, and entered into a collusive arrangement with C for the purpose of defrauding B. The lot was bid in by C, and he refused to release to B, except upon compliance with certain terms. The court held that C should be treated as holding the portion purchased by B, as trustee for B's benefit, and, so far as B was concerned, as A's mortgagee.³ A grantee under a deed with covenants of seisin and warranty, executed a mortgage for the purchase money to his grantor by a deed containing the same covenants. The grantee was evicted by force of a paramount title.

¹ *Burbank v. Gould*, 15 Me. 118.

² *Coombs v. Jenkins*, 16 Gray, 153. See *Wilcox v. Musche*, 39 Mich. 101.

³ *Huxley v. Rice*, 40 Mich. 73. See *Colby v. Cato*, 47 Ala. 247.

He was allowed to maintain an action against his grantor on the latter's covenant of seisin, and it was held that the covenants of the mortgagor did not operate as a rebutter.¹

§ 1093. Release of covenant by grantor.—Two opposite views prevail as to the power of the grantor to deprive a mortgagee of the stipulation made by a grantee to assume a mortgage. Where the covenant is considered one of indemnity only, of which the mortgagee may take advantage by a species of equitable subrogation, the parties to the covenant may at any time before a bill for foreclosure is filed, discharge the liability by a reconveyance, and as there is then no longer any contract of indemnity, there can be no right to which the mortgagee can be subrogated.² And this may be done under this view by a simple release.³ But on the other hand, in other courts, the promise is regarded as irrevocable, and it is held that where the deed to the grantee is absolute, he incurs an absolute obligation for its payment by assuming it, and that without the consent of the mortgagee, the grantor cannot release this obligation.⁴

§ 1094. Rights of grantor.—If the grantor is compelled to pay the amount of a mortgage which the grantee has assumed and agreed to pay, he may recover the amount so paid from the grantee.⁵ The grantor may have the mortgage assigned to himself and foreclose it, and sue for

¹ *Sumner v. Barnard*, 12 Met. 459.

² *Youngs v. Trustees of Public Schools*, 31 N. J. Eq. 290; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *Laing v. Byrne*, 34 N. J. Eq. 52.

³ *Youngs v. Trustees of Public Schools*, 31 N. J. Eq. 290; *Trustees for Support of Public Schools v. Anderson*, 30 N. J. Eq. 366.

⁴ *Douglass v. Wells*, 18 Hun, 88; *Campbell v. Smith*, 71 N. Y. 26; 27 Am. Rep. 5; *Hartley v. Harrison*, 24 N. Y. 170; *Kelly v. Roberts*, 40 N. Y. 432; *Bassett v. Hughes*, 43 Wis. 319; *Whiting v. Gearty*, 14 Hun, 498; *Flagg v. Munger*, 9 N. Y. 483. See, also, *Judson v. Dada*, 79 N. Y. 373; *Durham v. Bischof*, 47 Ind. 211.

⁵ *Wood v. Smith*, 51 Iowa, 156; *Lappen v. Gill*, 129 Mass. 349.

the deficiency as well as sue on the agreement.¹ A mortgagor who in a case of this kind is forced to pay the mortgage, is subrogated to the benefit of the security, and becomes an equitable assignee of it.² The grantor is entitled to recover as damages the amount of the mortgage, and the interest due thereon,³ or the amount which he has paid where he has discharged it before commencing his action.⁴

§ 1095. **Deed to tenants in common.**—If the grantees assuming the payment of a mortgage are tenants in common, they are jointly liable for a breach of the agreement. Thus, three grantees were held to be jointly liable under a deed which conveyed land to them, one-half to one and the other half to the other two, the *habendum* being in the same form, and the deed stating that the land was subject to the mortgage, which “the said grantees are to assume and pay.”⁵ A and B were each the owners of an undivided one-half of a tract of land. A mortgaged his interest in the land to C, and subsequently, with his co-tenant B, conveyed the land to D and E, D receiving two-thirds and E one-third, by two separate deeds, in each of which the grantee agreed to assume and pay the mortgage. After the mortgage became due, A commenced

¹ *Braman v. Dowse*, 12 Cush. 227; *Furnas v. Durgin*, 119 Mass. 500; 20 Am. Rep. 341; *Strohauer v. Voltz*, 42 Mich. 444; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *Jewett v. Draper*, 6 Allen, 434; *Bolles v. Beach*, 22 N. J. L. 680; 53 Am. Dec. 263; *Mills v. Watson*, 1 Sweeny, 374.

² *Ayers v. Dixon*, 78 N. Y. 318; *Kinnear v. Lowell*, 34 Me. 299; *Risk v. Hoffman*, 69 Ind. 137; *Baker v. Terrell*, 8 Minn. 195. See, also, *Rubens v. Prindle*, 44 Barb. 336; *Marsh v. Pike*, 1 Sand. Ch. 210; *Cornell v. Prescott*, 2 Barb. 16; *Marshall v. Davies*, 78 N. Y. 414.

³ *Locke v. Homer*, 131 Mass. 93; 41 Am. Rep. 199. See *Cilley v. Fenton*, 130 Mass. 123.

⁴ *Toun v. Wood*, 37 Ill. 512. See *Hall v. Way*, 47 Conn. 467; *Elmer v. Welch*, 47 Conn. 46.

⁵ *Fenton v. Lord*, 128 Mass. 466. Where property is covered by an indivisible mortgage, the voluntary partition of it, and a subsequent execution of a mortgage on one part, will not prevent the enforcement of the mortgage as against that part: *Groves v. Sentell*, 153 U. S. 465.

suit against D and E for foreclosure, and it was held that it was not necessary for him to first pay off the mortgage before bringing his suit, and that the assumption of the mortgage by D and E did not extend it over the whole tract of land, nor was it equivalent to an understanding that it should be a part of the purchase money so as to entitle the grantors to claim a vendor's lien on the whole tract.¹

§ 1096. Notice of rights of mortgagee from assumption clause in deed.—A statement contained in a deed which is duly recorded, that the deed is made subject to a mortgage held by a third person, is, it seems, constructive notice to all persons claiming under such deed of the rights of the holder of the mortgage referred to.²

§ 1097. Grantee's right to deduct mortgages.—A grantee who has received a deed, and has executed a mortgage upon the same property to secure the payment of the purchase money, may pay off encumbrances upon the land, the existence of which he knew at the time he made the contract, and may deduct the amount so paid from the amount due upon the mortgage made by him.³

§ 1098. Grantee's purchase of outstanding title.—If, subsequently to the execution of the mortgage, the grantee from the mortgagor purchases a paramount title outstanding in a third person, the mortgagee cannot claim the benefit of this purchase, nor will it operate as a confirmation of his title.⁴

¹ *Abell v. Coons*, 7 Cal. 105; 68 Am. Dec. 229. Where a purchaser of a half interest in land agrees to pay half of the mortgage debt resting on it, he is not entitled to a release of his half interest on tendering the amount of one-half of the debt: *Ward v. Green* (Tex. Civ. App., Dec. 5, 1894), 28 S. W. Rep. 574. A purchaser of a half interest subject to a mortgage, one-half of which he assumes, is liable on a deficiency judgment after foreclosure only to the extent of half the mortgage debt, after deducting half of the price for which the land sold: *Blass v. Terry*, 87 Hun, 563.

² *Campbell v. Vedder*, 1 Abb. N. Y. App. 295; *Crofut v. Wood*, 3 Hun, 571.

³ *Wolbert v. Lucas*, 10 Pa. St. 73; 49 Am. Dec. 578.

⁴ *Knox v. Easton*, 38 Ala. 345.

§ 1099. **Deed subject to two mortgages.**—When there are two mortgages upon the property, and the grantee, at the time of the purchase, agrees with the mortgagor to pay the mortgages, and retains a part of the consideration money for that purpose, and enters into possession, he is not permitted, by taking a conveyance from the first mortgagee, to set it up against the second mortgagee, notwithstanding the mortgagor deceived him as to the amount due.⁴

⁴ *Converse v. Cook*, 8 Vt. 164.

CHAPTER XXXI.

DEED WHEN A MORTGAGE.

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- § 1147 a. Trend of authority.

§ 1100. **In general.**—An absolute deed in form may not in reality be such, because there exists either a written agreement for a reconveyance, or a parol understanding that it was made solely as security for a debt. The law will declare the transaction as it really is. But equity will consider an absolute deed a mortgage, when at law it would not be so treated. Hence, there will be found a difference between the rules of law and equity as to the character of the instrument.

§ 1101. **Rule at law.**—At law, to constitute a mortgage, the grantor himself, and not a third person, must be entitled to the benefit of a defeasance.¹ But this is not the rule in equity, and the defeasance may be in favor of some person other than the grantor, and the transaction will be a mortgage.² It is not necessary that there be an express

¹ *Treat v. Strickland*, 23 Me. 234; *Stephenson v. Thompson*, 13 Ill. 186; *Bickford v. Daniels*, 2 N. H. 71; *Payne v. Patterson*, 77 Pa. St. 134; *Warren v. Lovis*, 53 Me. 463; *Shaw v. Erskine*, 43 Me. 371; *Pennsylvania Life Ins. Co. v. Austin*, 42 Pa. St. 257; *Marvin v. Titsworth*, 10 Wis. 320; *Carr v. Rising*, 62 Ill. 14; *Magnusson v. Johnson*, 73 Ill. 156; *Micou v. Ashurst*, 55 Ala. 607; *Hill v. Grant*, 46 N. Y. 496; *Flagg v. Mann*, 14 Pick. 467, 479; *Low v. Henry*, 9 Cal. 538.

² *Reigard v. McNeil*, 38 Ill. 400; *Stinchfield v. Milliken*, 71 Me. 567; *Sahler v. Signer*, 37 Barb. 329; s. c. 44 Barb. 606; *Umfreville v. Keeler*,

provision avoiding the deed upon the performance of the condition. If the instrument itself supplies the evidence that it was intended to secure the payment of a debt or the performance of an obligation, it is a mortgage.¹ When, at the time of the execution of an absolute conveyance, a separate defeasance or agreement to reconvey is also executed, the transaction, at law, will constitute a mortgage.² Where the deed and defeasance have been

1 *Thomp. & C.* 486; *Weed v. Stevenson*, *Clarke Ch.* 166; *Barton v. May*, 3 *Sand. Ch.* 450; *Spicer v. Hunter*, 14 *Abb. Pr.* 4; *McBurney v. Wellman*, 42 *Barb.* 390; *Ryan v. Dox*, 34 *N. Y.* 307; 90 *Am. Dec.* 696; *Jeffery v. Hursh*, 58 *Mich.* 246; 25 *N. W. Rep.* 176; 27 *N. W. Rep.* 7; *Martin v. Pond*, 30 *Fed. Rep.* 15; *Lindsay v. Matthews*, 17 *Fla.* 575; *First Nat. Bank v. Ashmead*, 23 *Fla.* 379; 2 *So. Rep.* 657. See, also, *Robinson v. Robinson*, 9 *Gray*, 447; 69 *Am. Dec.* 301; *Chase v. Peck*, 21 *N. Y.* 581.

¹ *Lanfair v. Lanfair*, 18 *Pick.* 299; *Steel v. Steel*, 4 *Allen*, 417; *Adams v. Stevens*, 49 *Me.* 362; *Oldham v. Halley*, 2 *Marsh. J. J.* 113; *Taylor v. Weld*, 5 *Mass.* 109; *Scott v. McFarland*, 13 *Mass.* 309; *Austin v. Downer*, 25 *Vt.* 558. See, also, *Ferguson v. Miller*, 4 *Cal.* 97; *Whitcomb v. Sutherland*, 18 *Ill.* 578; *Goddard v. Coe*, 55 *Me.* 385; *Nugent v. Riley*, 1 *Met.* 117; 35 *Am. Dec.* 355; *Kent v. Allbrittain*, 5 *Miss.* (4 *How.*) 317; *Perkins v. Dibble*, 10 *Ohio*, 433; 36 *Am. Dec.* 97; *Whitney v. French*, 25 *Vt.* 663.

² *Shaw v. Erskine*, 43 *Me.* 371; *Warren v. Lovis*, 53 *Me.* 463; *Clement v. Bennett*, 70 *Me.* 207; *Mills v. Darling*, 43 *Me.* 565; *Umbenhower v. Miller*, 101 *Pa. St.* 71; *Blaney v. Bearce*, 2 *Me.* 132; *Decker v. Leonard*, 6 *Lans.* 264; *Bayley v. Bailey*, 5 *Gray*, 505; *Nicolls v. McDonald*, 101 *Pa. St.* 514; *Murphy v. Calley*, 1 *Allen*, 107; *Judd v. Flint*, 4 *Gray*, 557; *Lane v. Shears*, 1 *Wend.* 433; *Clark v. Henry*, 2 *Cow.* 324; *Peterson v. Clark*, 15 *Johns.* 205; *Henry v. Davis*, 7 *Johns. Ch.* 40; *Hall v. Van Cleve*, 11 *N. Y. Leg. Obs.* 281; *Brown v. Dean*, 3 *Wend.* 208; *Weed v. Stevenson*, *Clarke Ch.* 166; *Lanahan v. Sears*, 102 *U. S.* 318; *Dow v. Chamberlin*, 5 *McLean*, 281; *Baxter v. Dear*, 24 *Tex.* 17; 76 *Am. Dec.* 89; *Hammonds v. Hopkins*, 3 *Yerg.* 525; *Caruthers v. Hunt*, 18 *Iowa*, 576; *Enos v. Sutherland*, 11 *Mich.* 538; *Freeman v. Baldwin*, 13 *Ala.* 246; *Sims v. Gaines*, 64 *Ala.* 392; *Marshall v. Stewart*, 17 *Ohio*, 356; *Reynolds v. Scott*, *Brayt.* 75; *Clark v. Lyon*, 46 *Ga.* 202; *Walker v. Tiffin Min. Co.*, 2 *Colo.* 89; *Friedley v. Hamilton*, 17 *Serg. & R.* 70; 17 *Am. Dec.* 638; *Manufacturers & Mechanics' Bank v. Bank of Pennsylvania*, 7 *Watts & S.* 335; 42 *Am. Dec.* 240; *Guthrie v. Kahle*, 46 *Pa. St.* 331; *Jaques v. Weeks*, 7 *Watts*, 261; *Johnston v. Gray*, 16 *Serg. & R.* 361; 16 *Am. Dec.* 577; *Houser v. Lamont*, 55 *Pa. St.* 311; 93 *Am. Dec.* 755; *Kerr v. Gilmore*, 6 *Watts*, 405; *Colwell v. Woods*, 3 *Watts*, 188; 27 *Am. Dec.* 345; *Stoever v. Stoever*, 9 *Serg. & R.* 434; *Plato v. Roe*, 14 *Wis.* 453; *Second Ward Bank v. Upmann*, 12 *Wis.* 499; *Knowlton v. Walker*, 13 *Wis.* 264; *Brinkman v. Jones*, 44 *Wis.* 498; *Sharkey v. Sharkey*, 47 *Mo.* 543; *Copeland v. Yoakum*, 38 *Mo.* 349;

executed and delivered at the same time and form parts of one transaction, the courts have universally considered them as constituting a legal mortgage. Thus, in legal effect, a lease in which the lessor acknowledges the receipt in advance of the stipulated rent of the leased premises during the term, and in which the lessee agrees to reconvey upon the payment of the sum advanced as rent and interest thereon, is a mortgage.¹ The law presumes a legal mortgage from the fact that the conveyance and defeasance are executed or agreed upon at the same time.² If, however, the grantee had no knowledge of the execution of the deed, a defeasance made by him upon being

Preschbaker v. Feaman, 32 Ill. 475; *Ewart v. Walling*, 42 Ill. 453; *Crasen v. Swoveland*, 22 Ind. 427; *Harbison v. Lemon*, 3 Blackf. 51; 23 Am. Dec. 376; *Watkins v. Gregory*, 6 Blackf. 113; *Mason v. Hearne*, 1 Busb. Eq. 88; *Robinson v. Willoughby*, 65 N. C. 520; *Ogden v. Grant*, 6 Dana, 473; *Edrington v. Harper*, 3 Marsh. J. J. 353; 20 Am. Dec. 145; *Honore v. Hutchings*, 8 Bush, 687; *Archambau v. Green*, 21 Minn. 520; *Benton v. Nicoll*, 24 Minn. 221; *Hill v. Edwards*, 11 Minn. 22; *Bunker v. Barron*, 79 Me. 62; 1 Am. St. Rep. 232; 8 Atl. Rep. 253; *Snow v. Pressey*, 82 Me. 552; 20 Atl. Rep. 78; *Stowe v. Merrill*, 77 Me. 550; *Knight v. Dyer*, 57 Me. 174; 99 Am. Dec. 765; *Cosby v. Buchanan*, 81 Ala. 574; 1 So. Rep. 898; *Rogers v. Jones*, 92 Cal. 80; 28 Pac. Rep. 97; *Smith v. Smith*, 80 Cal. 323; *Malone v. Roy*, 94 Cal. 341; 29 Pac. Rep. 712; *Gaither v. Clarke*, 67 Md. 18; 8 Atl. Rep. 740; *Short v. Caldwell*, 155 Mass. 57; 28 N. E. Rep. 1124; *Gunn's Appeal*, 55 Conn. 149; 10 Atl. Rep. 498; *Morrison v. Markham*, 78 Ga. 161; 1 S. E. Rep. 425; *Jackson v. Lynch*, 129 Ill. 72; 22 N. E. Rep. 246; *Kelley v. Lachman*, 2 Idaho, 1111; 29 Pac. Rep. 849; *Radford v. Folsom*, 58 Iowa, 473; 12 N. W. Rep. 536; *Short v. Caldwell*, 155 Mass. 57; 20 Atl. Rep. 78; *Clark v. Landon*, 90 Mich. 83; 51 N. W. Rep. 357; *Ferris v. Wilcox*, 51 Mich. 105; 47 Am. Rep. 551; *Martin v. Pond*, 30 Fed. Rep. 15; *Butman v. James*, 34 Minn. 547; 27 N. W. Rep. 66; *Moore v. Wills*, 69 Tex. 109; 5 S. W. Rep. 675; *Connolly v. Giddings*, 24 Neb. 131; 37 N. W. Rep. 939. See *Sims v. Gaines*, 64 Ala. 392; *Barthell v. Syverson*, 54 Iowa, 160; *Brush v. Peterson*, 54 Iowa, 243; *Lewis v. Small*, 71 Me. 552.

¹ *Nugent v. Riley*, 1 Met. 117; 35 Am. Dec. 355. See, also, *Scott v. McFarland*, 13 Mass. 308; *Lanfair v. Lanfair*, 18 Pick. 299; *Erskine v. Townsend*, 2 Mass. 493; 3 Am. Dec. 71; *Taylor v. Weld*, 5 Mass. 109; *Newhall v. Burt*, 7 Pick. 157; *Stocking v. Fairchild*, 5 Pick. 181; *Eaton v. Whiting*, 3 Pick. 484; *Clark v. Wodruff*, 9 Mich. 83; 51 N. W. Rep. 357.

² *Wilson v. Shoenberger*, 31 Pa. St. 295; *Reitenbaugh v. Ludwick*, 31 Pa. St. 131; *Clark v. Woodruff*, 90 Mich. 83; 51 N. W. Rep. 357; *Waters v. Crabtree*, 105 N. C. 394; 11 S. E. Rep. 240; *Jeffrey v. Hursh*, 58 Mich. 246; 25 N. W. Rep. 176; 27 N. W. Rep. 7.

informed of it is sufficient.¹ At law, to constitute a mortgage, an agreement for reconveyance, even though it is made simultaneously with the deed, must be under seal, or of as high a nature as the deed itself.² If the agreement is not under seal, the transaction will be treated as a mortgage only by a court of equity.³ A defeasance, to have the effect of transforming an absolute deed into a mortgage, must be unqualified and absolute in its provisions for reconveyance. Where the instrument allows the grantee an election between a reconveyance and the payment of a sum of money, he has the option of considering the fee absolute.⁴

§ 1102. Requirement as to time of execution.—At law the delivery of the deed and defeasance should be made at the same time, but it is of no consequence that they bear different dates.⁵ All that is essential is that they become operative at the same time, and are parts of the same transaction.⁶ And where there is a variance in the dates, it may be shown by parol evidence that they were delivered at the same time.⁷ Where a deed was dated on July 20th, and a bond for a reconveyance was dated July 30th, and both were acknowledged on the 31st of July, the two instruments were held to have been executed con-

¹ *Harrison v. Phillips Academy*, 12 Mass. 456.

² *Jewett v. Bailey*, 5 Me. 87; *French v. Sturdivant*, 8 Me. 246; *Warren v. Lovis*, 53 Me. 463; *Murphy v. Calley*, 1 Allen, 107; *Flint v. Sheldon*, 13 Mass. 443; 7 Am. Dec. 162; *Kelleran v. Brown*, 4 Mass. 443; *Flagg v. Mann*, 14 Pick. 467; *Scituate v. Hanover*, 16 Pick. 222; *Cutler v. Dickinson*, 8 Pick. 386. And see *Runlet v. Otis*, 2 N. H. 167; *Harrison v. Phillips Academy*, 12 Mass. 456.

³ *Eaton v. Green*, 22 Pick. 526; *Flagg v. Mann*, 14 Pick. 467; *Cutler v. Brown*, 8 Pick. 386.

⁴ *Fuller v. Pratt*, 10 Me. 197.

⁵ *Kelly v. Thompson*, 7 Watts, 401; *Haines v. Thomson*, 70 Pa. St. 434; *Cotton v. McKee*, 68 Me. 486; *Kelleran v. Brown*, 4 Mass. 443; *Harrison v. Phillips Academy*, 12 Mass. 456.

⁶ *Bennoch v. Whipple*, 12 Me. 346; 28 Am. Dec. 186; *McLaughlin v. Shepherd*, 32 Me. 143; 52 Am. Dec. 646; *Waters v. Crabtree*, 105 N. C. 394; 11 S. E. Rep. 240.

⁷ *Brown v. Holyoke*, 53 Me. 9.

currently as parts of the same transaction.¹ If there is a verbal agreement for a subsequent defeasance at the time of the execution of the deed, operation is given to the defeasance by considering it as relating back to the deed.² But if it is delivered to a third person to hold as an escrow until the discharge of the indebtedness, it is not considered as executed and delivered at the same time as the deed, nor as forming part of the same transaction, and a mortgage is not thereby created.³ Where an absolute deed and an agreement for reconveyance on condition that the money advanced was to be repaid in a specified time, were placed in the hands of a third person, with instructions to deliver them both to the grantee if the repayment was not made in the time limited, and it not being so made, they were delivered at the grantor's direction to the grantee, it was held that upon the delivery of the deed the grantee took an absolute fee.⁴ When the deed and agreement to reconvey are free from ambiguity, their construction and legal effect are matters of law for the court to determine.⁵ Even at law, if there is a separate contemporaneous agreement in writing to reconvey the premises upon the payment of the debt, a deed absolute upon its face, but intended as security for the payment of such money, is a mortgage.⁶

§ 1103 Deed and defeasance may be shown by parol evidence to be parts of same transaction.—That the

¹ *Lentz v. Martin*, 75 Ind. 228.

² *Lovering v. Fogg*, 18 Pick. 540. See, also, *Scott v. Henry*, 13 Ark. 112. But see *contra*, *Lund v. Lund*, 1 N. H. 39; 8 Am. Dec. 29; *Waters v. Crabtree*, 105 N. C. 394; 11 S. E. Rep. 240; 1 So. Rep. 898; *Cosby v. Buchanan*, 81 Ala. 574. Where there has been a reconveyance and a second deed executed between the same parties, there may be a redelivery of the same defeasance: *McIntier v. Shaw*, 6 Allen, 83. See *Judd v. Flint*, 4 Gray, 507.

³ *Bodwell v. Webster*, 13 Pick. 411. But see *Carey v. Rawson*, 8 Mass. 159; *Exton v. Scott*, 6 Sim. 31.

⁴ *Glendenning v. Johnston*, 33 Wis. 347. See *Henley v. Hotaling*, 41 Cal. 22, 28; *Leggett v. Edwards*, Hopk. Ch. 530.

⁵ *Keith v. Catchings*, 64 Ga. 473.

⁶ *Teal v. Walker*, 111 U. S. 242.

parties intended by the execution of the deed and defeasance to create a mortgage, may be shown by parol evidence. Such evidence is received to show their connection with each other, that they were agreed upon at one time and are in fact one contract, and not to vary or contradict the written instruments.¹ The loss or destruction of the defeasance occasioned by fraud or mistake may also be shown by evidence of this character.² When it appears that the transaction was originally a sale, and it is claimed that its character has been changed, the burden of proof to establish this is upon the grantor.³ A mortgage is conclusively presumed from the circumstance that the deed and defeasance bear the same date, and parol evidence is inadmissible to show a different understanding between the parties for the purpose of converting the transaction into a conditional sale.⁴ Where there is a variance in the dates, but the agreement to reconvey contains a recital that it and the deed were delivered on the same day, the presumption is that they constitute a mortgage; but this presumption may be rebutted by evidence showing that the deed was executed, not as a security for the performance of an obligation, but as the completion of a sale.⁵ In California, where the grantee agreed that if he should not procure the testimony of two witnesses to a certain state of facts the deed should be null and void, it was held that the transaction did not constitute a mortgage; the legal estate had once vested in the grantee, and as it could not be divested by his default in

¹ *Reitenbaugh v. Ludwick*, 31 Pa. St. 131, 138; *Preschbaker v. Feaman*, 32 Ill. 475; *Kelly v. Thompson*, 7 Watts, 401; *Wilson v. Schoenberger*, 31 Pa. St. 295; *Gay v. Hamilton*, 33 Cal. 686; *Tillson v. Moulton*, 23 Ill. 648; *Franklin v. Ayer*, 22 Fla. 654; *Gassert v. Bogk*, 7 Mont. 585; 19 Pac. Rep. 281; *Waters v. Crabtree*, 105 N. C. 394; 11 S. E. Rep. 240; *First Nat. Bank v. Ashmead*, 23 Fla. 379; 2 So. Rep. 657.

² *Marks v. Pell*, 1 Johns. Ch. 594.

³ *Haines v. Thompson*, 70 Pa. St. 434.

⁴ *Kerr v. Gilmore*, 6 Watts, 405; *Brown v. Nickle*, 6 Pa. St. 390.

⁵ *Haines v. Thompson*, 70 Pa. St. 434. See *Gubbings v. Harper*, 7 Phila. 276; *Baisch v. Oakeley*, 68 Pa. St. 92.

performing an illegal agreement, the deed to him became absolute.¹

§ 1104. **Condition in deed construed as lien.**—Where a deed contains the clause “nevertheless, this deed of conveyance is null and void, and of no effect until all the purchase money is paid, then of full force and effect,” a noncompliance with the condition will not be treated as operating as an absolute avoidance of the title of the grantee. It will be construed as giving to the grantor merely a lien or mortgage to secure the unpaid purchase money.²

§ 1105. **Cancellation of defeasance.**—In those States in which the mortgage, irrespective of its form, is simply a lien or charge upon the mortgaged premises, the mortgagor retaining the legal title, the title is not transferred to the mortgagee by the surrender or cancellation of the defeasance.³

§ 1106. **Transfer of absolute title.**—If an absolute deed is executed, and the grantee therein at the same time executes to the grantor a bond for reconveyance upon the repayment of a certain sum, and if after default in payment has occurred, the bond by the mutual consent of the parties is destroyed, and the possession of the land is transferred to the grantee by virtue of a new contract, in which by a parol agreement the grantor is to surrender all claim upon the land, the title does not pass by such delivery of possession.⁴ The destruction of the bond does not estop the grantor from denying that the title passed by the deed.⁵ But where this equitable doctrine does not prevail, an absolute title may be vested in the

¹ *Patterson v. Donner*, 48 Cal. 369.

² *Miskelly v. Pitts*, 9 Baxt. (Tenn.) 193.

³ *Brinkham v. Jones*, 44 Wis. 498. Where the grantee agrees to reconvey upon the payment by the grantor of the sum due, and the defeasance is surrendered, the mortgagor, notwithstanding the surrender, may redeem upon making the payment: *Clark v. Finlon*, 90 Ill. 245.

⁴ *Howe v. Carpenter*, 49 Wis. 697.

⁵ *Howe v. Carpenter*, 49 Wis. 697.

mortgagee, if the rights of others have not intervened by the subsequent cancellation, upon sufficient consideration of the agreement for reconveyance. But this must be done after the creation of the mortgage, for an agreement made at the time, allowing the mortgagee at his option to declare his estate absolute, and depriving the mortgagor of his right of redemption, is invalid.¹ If at the time the deed is executed a bond of defeasance is given, which at the expiration of the time limited is surrendered and destroyed, and if upon a consideration exceeding the former one in amount a new bond is given, by which the grantee agrees to reconvey the premises upon the payment within an additional time of the increased sum, the grantor thereby surrenders and abandons his title as mortgagor, and the fee is vested in the grantee. The second bond is considered merely a personal contract on the part of the grantee.² Where the original transaction is confirmed as a sale, after the delivery for a sufficient consideration of the defeasance for cancellation, and is so treated as a sale by the grantor and his heirs, it cannot subsequently be dealt with as a mortgage, and foreclosed.³

§ 1107. Waiver of right of redemption.—When the transaction is a mortgage, the mortgagor cannot, by any

¹ *Trull v. Skinner*, 17 Pick. 213; *Harrison v. Phillips Academy*, 12 Mass. 456; *Waters v. Randall*, 6 Met. 479.

² *Falis v. Conway Mut. F. Ins. Co.*, 7 Allen, 46, in which Hoar, J., says: "The bond of defeasance, the only contract made with him at the time when he conveyed the land, had been surrendered, and by the agreement of the parties had become inoperative and void. The new bonds given in succession were in every essential particular new and independent contracts; they were different in amount, upon a consideration partly new and to be performed at a different time. They were therefore merely personal contracts; and not being made at the same time with the conveyance of the land, or provided for in any agreement made at that time, did not create any estate in the land. The plaintiff had surrendered and abandoned the title which he held as mortgagor, and made a contract to purchase the land upon a new condition and for a new consideration": *Carpenter v. Carpenter*, 70 Ill. 457; *Maxfield v. Patchen*, 29 Ill. 39, 42; *Rice v. Rice*, 4 Pick. 349, 350, n.

³ *Shubert v. Stanley*, 52 Ind. 46.

contract made at the time, waive his right of redemption.¹ The fact that the deed is mentioned as an absolute conveyance in the receipts and accounts between the parties cannot affect the right of redemption.² Where it is agreed that the deed shall be absolute "with no right of redemption," if the grantor fails to pay the sum specified in an agreement for reconveyance under seal, made at the same time with the deed, the transaction is regarded as a mortgage, of which the right of redemption is an inseparable incident.³ An agreement to restrict the right of redemption to the mortgagor alone, or to a particular class of persons, may be equivalent to depriving the mortgagor of the right of redemption altogether. A restriction of this character, therefore, is void, because it is inconsistent with the very nature of a mortgage.⁴ An agreement made subsequently to convert into an absolute conveyance what was primarily a mortgage is viewed with disfavor, and will not be upheld unless it appear that the creditor took no undue advantage.⁵ It therefore follows that the creditor has the burden of proof to show the deliberate surrender, upon a sufficient consideration of the right of

¹ *Clark v. Henry*, 3 Cowen, 324; *Robinson v. Farrelly*, 16 Ala. 472; *Youle v. Richards*, 1 N. J. Eq. (Sax.) 534; 23 Am. Dec. 722; *Rankin v. Mortimere*, 7 Watts, 372; *Cherry v. Bowen*, 4 Sneed, 415; *Pierce v. Robinson*, 13 Cal. 116; *Clark v. Condit*, 18 N. J. Eq. 358; *Rogan v. Walker*, 1 Wis. 527; *Plato v. Roe*, 14 Wis. 453; *Orton v. Knab*, 3 Wis. 576; *Knowlton v. Walker*, 13 Wis. 264; *Baxter v. Child*, 39 Me. 110; *Peugh v. Davis*, 96 U. S. 332; *Fields v. Helms*, 82 Ala. 449; 3 So. Rep. 106; *Nelson v. Kelly*, 91 Ala. 569; 8 So. Rep. 690; *McMillan v. Jewett*, 85 Ala. 476; 5 So. Rep. 145; *Simon v. Schmidt*, 41 Hun, 318; *Turpie v. Lowe*, 114 Ind. 37; 15 N. W. Rep. 834.

² *Bayley v. Bailey*, 5 Gray, 505.

³ *Murphy v. Calley*, 1 Allen, 107.

⁴ *Johnston v. Gray*, 16 Serg. & R. 361; 16 Am. Dec. 577. And see *McClurkan v. Thompson*, 69 Pa. St. 305; *Howard v. Harris*, 1 Vern. 33; *Newcomb v. Bohnam*, 1 Vern. 8; *Spurgeon v. Collier*, 1 Eden, 55. But arrangements of this character are sometimes under peculiar circumstances permitted: *Stover v. Bounds*, 1 Ohio St. 107; *Bonham v. Newcomb*, 1 Vern. 8; 2 Vent. 364.

⁵ *Henry v. Davis*, 7 Johns. Ch. 40; *Wright v. Bates*, 13 Vt. 341; *Mills v. Mills*, 26 Conn. 213.

redemption.¹ When an existing debt is the consideration for a deed, an agreement depriving the debtor of his right of redemption is generally disregarded.²

§ 1108. **Confidential relations.**—A court of equity will closely watch transactions between persons occupying confidential relations toward each other. Where a deed has been made by a person to his confidential agent and advisor, and the grantor claims that it was given and received as security for a loan, the whole burden of sustaining the validity and good faith of the dealings between the parties is imposed upon the agent and advisor.³ “Now it is a well-settled principle of equity jurisprudence,” said Mr. Justice Potter, “that the court will always look with jealousy upon all transactions between parties so situated; and the burden of proof is entirely upon the guardian, trustee, agent, or other person sustaining this confidential relation, to show that he has taken no advantage of his situation. It is not necessary that there should be fraud to justify the court’s interference. In the present case, there were all the elements usually found in cases where the courts have granted relief. There was complete ignorance of business affairs, complete confidence, and the dependence resulting from that confidence on one side, and on the other side, superior business knowledge, and the influence of his position as administrator of her father’s estate.”⁴

§ 1109. **Notice given by recording.**—The defeasance without recording is good between the parties themselves.⁵

¹ *Brown v. Gaffney*, 28 Ill. 149; *Villa v. Rodriguez*, 12 Wall. 324; *Locke v. Palmer*, 26 Ala. 312; *Shaw v. Walbridge*, 33 Ohio St. 1; *Baughner v. Merryman*, 32 Md. 185.

² *Batty v. Snook*, 5 Mich. 231; *Enos v. Sutherland*, 11 Mich. 538. A mere shuffling of words cannot destroy the provisions of law relating to mortgages. When the transfer of property is intended to secure the purchase price, the transaction is a mortgage: *Palmer v. Howard*, 72 Cal. 293; 1 Am. St. Rep. 60.

³ *Tappan v. Aylsworth*, 13 R. I. 582.

⁴ *Tappan v. Aylsworth*, 13 R. I. 582.

⁵ *Bayley v. Bailey*, 5 Gray, 505, 510; *Jackson v. Ford*, 40 Me. 381.

Against others, recording is not necessary when the conveyance does not purport to be an absolute deed.¹ A purchaser with actual notice of an unrecorded defeasance takes the title subject to the mortgage.² It has been held that when the defeasance has not been acknowledged, and for that reason is not entitled to be recorded, a purchaser without notice of the defeasance, notwithstanding that it has in fact been recorded, acquires a title unaffected by it.³ Continuance in possession by the grantor after the recording of the deed made by him does not impart notice of a bond for reconveyance.⁴ A distinction is to be observed throughout this chapter between a legal mortgage and an equitable mortgage. Notice of a legal mortgage can be imputed to a purchaser only when he had sufficient grounds for believing that the conveyance and defeasance were in their execution and delivery parts of one transaction.⁵ On the one hand, it is stated that a purchaser has notice when he has actual knowledge of such circumstances as would put a prudent man upon inquiry, and that by prosecuting such inquiry, he might ascertain the actual right or title.⁶ On the other hand, it is asserted that knowledge of the open and visible possession by the grantor after his conveyance by absolute deed, is not sufficient to imply actual notice.⁷ The true rule, except where the statute is imperative, would seem

¹ *Russell v. Waite*, Walk. Ch. 31.

² *Newhall v. Pierce*, 5 Pick. 450; *Corpman v. Baccastow*, 84 Pa. St. 363; *Tufts v. Tapley*, 129 Mass. 380; *Catlin v. Bennett*, 47 Tex. 165; *Newhall v. Burt*, 7 Pick. 157; *Purrrington v. Pierce*, 38 Me. 447; *Friedley v. Hamilton*, 17 Serg. & R. 70; 17 Am. Dec. 638; *Manufacturers & Mechanics' Bank v. Bank of Pa.*, 7 Watts 335; 42 Am. Dec. 240; *Butman v. James*, 34 Minn. 547; 27 N. W. Rep. 66.

³ *Cogan v. Cook*, 22 Minn. 137.

⁴ *Newhall v. Pierce*, 5 Pick. 450.

⁵ *Newhall v. Burt*, 7 Pick. 157.

⁶ *Brinkman v. Jones*, 44 Wis. 498; *Musgrove v. Bonser*, 5 Or. 313; 20 Am. Rep. 737; *Porter v. Sevey*, 43 Me. 519; *Maupin v. Emmons*, 47 Mo. 304; *Wilson v. Miller*, 16 Iowa, 111.

⁷ *Lamb v. Pierce*, 113 Mass. 72; *White v. Foster*, 102 Mass. 375; *Cras-sen v. Swoveland*, 22 Ind. 427, 434; *Story's Eq. Jur.*, § 399; *Jones on Mortgages*, §§ 253, 579.

to be that actual occupation by the mortgagor is sufficient to put a purchaser from the grantee upon inquiry, and if he fails to prosecute it, to fasten upon him notice of the mortgagor's rights. It is not to be presumed that a purchaser in good faith will buy land without ascertaining, or making an attempt to ascertain, the claims of the person in open possession.¹ A subsequent purchaser is bound only by what appears in the record, and has a right to assume where the instruments were executed on different days, and each is independent of the other, that the transaction was an absolute sale with an agreement to repurchase.² But if it is apparent from the construction of the instruments themselves that the transaction is a mortgage, as where there is a reference in the defeasance to the debt secured, the purchaser is charged with notice.³ If the mortgagee, who is apparently a grantee, conveys to a person who has notice of the defeasance, such person acquires simply an assignment of the mortgage.⁴

§ 1110. Conditional sale or mortgage.—The peculiar circumstances belonging to each particular case must be the criterion by which to determine whether a conveyance is a mortgage or a conditional sale.⁵ And whenever from a consideration of the situation of the parties, and of the surrounding facts, together with the written instruments

¹ *Daubenspeck v. Platt*, 22 Cal. 330; *Pritchard v. Brown*, 4 N. H. 397; 17 Am. Dec. 431.

² *Weide v. Gehl*, 21 Minn. 449.

³ *Hill v. Edwards*, 11 Minn. 22. See *King v. Little*, 1 Cush. 436.

⁴ *Halsey v. Martin*, 22 Cal. 645.

⁵ *Edrington v. Harper*, 3 Marsh. J. J. 353, 354; 20 Am. Dec. 145; *Hughes v. Sheaff*, 19 Iowa, 335; *Heath v. Williams*, 30 Ind. 495; *Lucas v. Hendrix*, 92 Ind. 54; *Davis v. Stonestreet*, 4 Ind. 101; *Cornell v. Hall*, 22 Mich. 377, 383; *Smith v. Crosby*, 47 Wis. 160; *Hihn v. Peck*, 30 Cal. 280; *Horbach v. Hill*, 112 U. S. 144; *Stephens v. Allen*, 11 Or. 188; 3 Pac. Rep. 168; *Gibbs v. Penny*, 43 Tex. 560; *Loving v. Milliken*, 59 Tex. 423; *Stamper v. Johnson*, 3 Tex. 1; *Pendergrass v. Burris* (Cal., Sept. 22, 1888), 19 Pac. Rep. 187; *Gray v. Shelby*, 83 Tex. 405; 18 S. W. Rep. 809; *Gassert v. Bogk*, 7 Mont. 585; *Trimble v. McCormick* (Ky., Feb. 7, 1891), 15 S. W. Rep. 358.

themselves, it is apparent the parties intended to make a conditional sale, the courts will respect and enforce their contract. "To deny the power of two individuals," says Chief Justice Marshall, "capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day, or in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the court of chancery, in a considerable degree the guardianship of adults as well as of infants. Such contracts are certainly not prohibited either by the letter or the policy of the law. But the policy of the law does prohibit the conversion of a real mortgage into a sale; and as lenders of money are less under the pressure of circumstances which control the perfect and free exercise of the judgment than borrowers, the effort is frequently made by persons of this description to avail themselves of the advantage of this superiority, in order to obtain inequitable advantages. For this reason the leaning of courts has been against them, and doubtful cases have generally been decided to be mortgages. But as a conditional sale, if really intended, is valid, the inquiry in every case must be whether the contract in the specific case is a security for the repayment of money or an actual sale."¹ As a court of equity will receive any evidence to show that an absolute conveyance was intended as a security, a transaction which a court of law would determine to be a conditional sale, a court of equity may declare to be a mortgage.² Yet when it clearly appears that the parties in-

¹ *Conway v. Alexander*, 7 Cranch, 218. Language to the same effect is employed by Chief Justice Rhodes in *Henley v. Hotaling*, 41 Cal. 22, from which we quote this sentence: "Such a contract is not opposed to public policy, nor is it in any sense illegal; and courts would depart from the lines of their duties should they, in disregard of the real intention of the parties, declare it to be a mortgage." See *Haynie v. Robertson*, 58 Ala. 37; *Smith v. Crosby*, 47 Wis. 160.

² *McNamara v. Culver*, 22 Kan. 661; *Flagg v. Mann*, 2 Sum. 486; *Dougherty v. McColgan*, 6 Gill & J. 275; *Pearson v. Seay*, 38 Ala. 643.

tended a conditional sale, their contract will be enforced.¹ But it should be observed that the contract in a doubtful case will be construed to be a mortgage rather than a conditional sale.² If a defeasance exists, although it may not have been recorded, the equity of redemption under the former national bankruptcy act would vest in the grantor's trustees, and an attaching creditor could not obtain the benefit of an estoppel by reason of the nonregistration of the agreement of defeasance.³

§ 1111. Purchase money mortgage by married woman.—A person sold a tract of land to a woman whose husband was not living with her. The vendor supposed that she was unmarried, and he took her individual note and mortgage back for a part of the purchase money. Ordinarily, the mortgage would be void and incapable of correction. But in a suit by the assignee of the note, the court held that the deed and void mortgage were to be treated as one transaction. Hence, subsequent purchasers with notice would acquire the title in trust for the payment of the mortgage note.⁴ The grantor would have had a vendor's lien if he had not taken the mortgage. But he was entitled also to have the more ample remedy of a trust capable of assignment, which could be enforced against subsequent purchasers with notice.⁵ This prin-

¹ *Goodman v. Grierson*, 2 Ball & B. 274; *Bloodgood v. Zeily*, 2 Caines Cas. 124; *Davis v. Thomas*, 1 Russ. & M. 506; *Pennington v. Hanby*, 4 Munf. 140. See *Stroup v. Haycock*, 56 Iowa, 729.

² *Robertson v. Campbell*, 2 Call, 421; *Poindexter v. McCannon*, 1 Dev. Eq. 377; 18 Am. Dec. 591; *King v. Newman*, 2 Munf. 40; *Sears v. Dixon*, 33 Cal. 326; *Skinner v. Miller*, 5 Litt. 84, 86; *Gray v. Shelby*, 83 Tex. 405; 18 S. W. Rep. 809; *Cosby v. Buchanan*, 81 Ala. 574; 1 So. Rep. 398; *Walker v. McDonald*, 49 Tex. 458; *Mitchell v. Wellman*, 80 Ala. 16; *Vincent v. Walker*, 86 Ala. 233; 5 So. Rep. 465; *Stephens v. Allen*, 11 Or. 188; 3 Pac. Rep. 168; *Baughner v. Merryman*, 32 Md. 185; *Gilchrist v. Beswick*, 33 W. Va. 168; 10 S. E. Rep. 371; *O'Neil v. Cappelle*, 62 Mo. 202; *Turner v. Kerr*, 44 Mo. 429; *De Bruhl v. Maas*, 54 Tex. 464; *Heath v. Williams*, 30 Ind. 495; *Snively v. Pickle*, 29 Gratt. 27.

³ *Moors v. Albro*, 129 Mass. 9.

⁴ *Ogle v. Ogle*, 41 Ohio St. 359.

⁵ *Ogle v. Ogle*, 41 Ohio St. 359.

ciple is further illustrated by a case that occurred in California, where an owner of land agreed with a purchaser to sell him a tract of land. Part of the purchase money was to be paid at the time, and the balance was to be secured by a mortgage on the land. At the request of the purchaser the deed was made to his wife, and the notes and mortgage for the part of the purchase price remaining unpaid were executed by her. The court, without deciding the point as to the loss of the vendor's lien, held that, as in the beginning the parties had agreed that a mortgage should be executed, the transaction would be treated as an equitable mortgage to secure the portion of the purchase money unpaid and the interest on this sum.¹ The decision was placed on the ground that, although the instrument purporting to be a mortgage was void, for the reason that the wife had no power to execute a mortgage of the community property, yet that equity would treat that as done which the parties agreed to have done, and which ought to have been done.²

¹ *Remington v. Higgings*, 54 Cal. 620.

² Mr. Justice Sharpstein concurred in the judgment, but was of the opinion that the grantor had not lost his vendor's lien, for the unpaid purchase money. He said on this point: "Under our Code, the effect of the plaintiff's deed was the same as if it had been executed to the husband. And the transaction must be treated as it would be if the land had been conveyed to him, and his wife had executed a mortgage upon it to secure the payment of the purchase money. She purchased nothing, obtained no title to anything, and gave no security for the payment of anything. Under the circumstances, it seems to me that she might, with perfect propriety, be left out of view altogether, and the case be considered as one in which the husband purchased the land, acquired the title, paid a part of the purchase money, and gave no security for the payment of the balance. If the plaintiff has done any act manifesting an intention not to rely upon the land for security, his claim to a vendor's lien cannot be maintained. But the facts as found by the court satisfy me that the plaintiff throughout manifested an intention to rely upon the land as security for the payment of the purchase money, for which credit was given. The very instrument which it is claimed constituted a waiver of the vendor's lien purports to be a mortgage upon the land sold by the plaintiff. Besides, the court finds that it was agreed between the vendor and the vendee that the payment of so much of the purchase money as was not paid at the time of the execution of the conveyance should be secured by a mortgage upon the land conveyed. N

§ 1111 a. **Same by natural guardian of minors.**—So, where land is conveyed by deed to a father and his minor children, and he, for the purpose of securing the balance due on the purchase price of the land, gives a mortgage signed by him for himself and as guardian of his minor children, the mortgage may be enforced as an equitable mortgage upon the whole land, and the interest of the minors acquired under the deed is subject to the lien of the mortgage.¹ On the ground that a mortgage defectively executed, as well as an imperfect effort to create a mortgage upon specific property for the purpose of securing the payment of a debt, will, in equity, create a specific lien upon the property intended to be mortgaged, the court held, that the law as above stated would apply, though it did not appear whether any portion of the money paid was the property of the minors, or whether the father was or was not the guardian of their estates.² In other words,

such mortgage was ever executed, but the agreement to execute it on the one side, and to accept it on the other, shows that it was the intention of the vendor to rely upon the land for security.”

¹ Peers v. McLaughlin, 88 Cal. 294.

² Peers v. McLaughlin, 88 Cal. 294. The court referred to cases where imperfect instruments were enforced; and, upon the subject of enforcing such contracts against minors said, per Mr. Justice De Haven: “We have not overlooked the fact that in all the cases above cited the persons against whom the imperfect instrument was enforced had the capacity to make a valid contract, while by the judgment here it is the land of the minors, who were and are incapable of contracting for land, and in a general sense of ratifying such a contract, against which this mortgage is enforced. But this fact ought not, under the circumstances here disclosed, to prevent the application of the equitable rule which lies at the foundation of these cases. It must be borne in mind also, that the agreement of the father, and his assumed agency in accepting a deed in pursuance of the agreement, is the source or foundation of all the right, legal or equitable, which these minors have in the land. The deed was made to them solely by direction of the father. That was the form which the transaction took, and in equity the agreement that the purchase price should be secured by a mortgage upon the land, the conveyance and the mortgage must be regarded as one transaction, and no person, whether minor or adult, can be permitted to adopt that part of an entire transaction which is beneficial, and reject its burdens. This commanding principle of justice is so well established that it has become one of the maxims of the law. The father acted for the children, and they must either accept or repudiate the entire contract which he made; they can-

in all such cases equity will consider as done that which the parties agreed to do, and which, as a matter of fair, conscientious dealing, ought to have been done. On the same principle, where a trustee holds land for the separate use of a married woman under a deed reserving to her the right to sell, and giving her the power, in union with her husband and trustee, to convey the land, and a trust deed is executed by her and her husband, to which the trustee is not a formal party, but which in a sealed writing attached to the instrument he approves, the trust deed will create an equitable mortgage, even though the legal title will not pass because the trustee is not a legal party.¹

§ 1112. **Absolute deed in equity when executed as security for money.**—Where the transaction is considered to possess the nature of a mortgage, permitting the grantor to demand a reconveyance, the grantee has the right to enforce repayment; but where it amounts to a conditional sale, so that a repurchase is optional with the grantor, the grantee cannot compel repayment. In other words, the rights of the parties must be reciprocal.² The question

not retain its fruits and at the same time deny its obligations. 'A party cannot apply to his own use that part of the transaction which may bring to him a benefit, and repudiate the other, which may not be to his interest to fulfill. Thus it had been held that an infant cannot avoid a mortgage and affirm a deed, when both are made at one and the same time, relate to the same property, and go to make up one transaction. If the mortgage be avoided under the plea of infancy, the deed becomes of no effect': *Heath v. West*, 28 N. H. 108.

"In this case the minors are before the court, and have filed an answer by their guardian *ad litem*. They have not disclaimed the title vested in them by the deed procured under the circumstances stated, but seek to defeat the lien of plaintiffs' mortgage, so far as their title is concerned, by the plea 'that they have not ratified any contract relating to the sale of said lot, and that they are incapable of ratifying the same.' But what the rules of equity would not permit them to do if they had attained their majority they cannot be permitted to do now through their guardian *ad litem*."

¹ *Bensimer v. Fell*, 35 W. Va. 15; 29 Am. St. Rep. 774. See, also, *Averett v. Lipscombe*, 76 Va. 404.

² *Williams v. Owen*, 10 Sim. 386; *Alderson v. White*, 2 De Gex & J. 97; *McNamara v. Culver*, 22 Kan. 661, 669; *Hurst v. Beaver*, 50 Mich. 612; *Davis v. Thomas*, 1 Russ. & M. 506; *Tapply v. Sheather*, 8 Jur.

to be solved is whether the transaction was essentially a loan. In a case in West Virginia, the grantee, under an absolute deed, agreed that the grantor might repurchase the lands conveyed in three, six, and twelve months respectively, for certain fixed sums, largely in excess of the consideration expressed in the conveyance, and interest thereon, provided that the grantor would elect to repurchase within six months from the date of the agreement. The time provided for the grantor to elect having elapsed without his doing so, the grantee declined to allow a repurchase. It appearing that the transaction was, in fact, a loan, the court permitted the grantor to redeem by paying the sum advanced with interest.¹ The question is one

N. S. 1163; *Goodman v. Grierson*, 2 Ball & B. 274; *Shaw v. Jeffrey*, 13 Moore P. C. C. 432; *Green v. Butler*, 26 Cal. 595. See *People v. Irwin*, 14 Cal. 428; *Ford v. Irwin*, 18 Cal. 117; *Fisk v. Stewart*, 24 Minn. 97.

¹ *Klinck v. Price*, 4 W. Va. 4; 6 Am. Rep. 268. The substance, not the form, of the transaction must determine its nature: *Holton v. Meighen*, 15 Minn. 69; *Spence v. Steadman*, 49 Ga. 133; *Hicks v. Hicks*, 5 Gill & J. 75; *Hill v. Edwards*, 11 Minn. 22; *Weide v. Gehl*, 21 Minn. 449; *Kuhn v. Rumpp*, 46 Cal. 299; *Wheeland v. Swartz*, 1 Yeates, 579; *Starks v. Redfield*, 52 Wis. 349; *Leahigh v. White*, 8 Nev. 147; *Cole v. Bolard*, 22 Pa. St. 431; *Lindsay v. Matthews*, 17 Fla. 575; *Ehert v. Chapman*, 8 Baxt. (Tenn.) 27; *Clark v. Finlon*, 90 Ill. 245; *Wells v. Somers*, 4 Ill. App. 297; *Scott v. Mewhirter*, 49 Iowa, 487. As is said in *Robinson v. Cropsey*, 2 Edw. Ch. 138, 144: "If the deed or conveyance be accompanied by a condition or matter of defeasance expressed in the deed, or even contained in a separate instrument or exist merely in parol, let the consideration for it have been a pre-existing debt, or a present advance of money to the grantor, the only inquiry necessary to be made is, whether the relation of debtor and creditor remains, and a debt still subsists between the parties; for if it does, then the conveyance must be regarded as a security for the payment, and be treated in all respects as a mortgage. On the other hand, where the debt forming the consideration for the conveyance is extinguished at the time by the express agreement of the parties, or the money advanced is not paid by way of loan, so as to constitute a debt and liability to repay it, but by the terms of the agreement the grantor has the privilege of refunding or not at his election, then it must be deemed purchase money, and the transaction will be a sale upon condition, which the grantor can defeat only by a repurchase, or performance of the condition on his part, within the time limited for the purchase, and in this way entitle himself to a reconveyance of the property." See *Wilmerding v. Mitchell*, 42 N. J. L. 476.

of intention, to be gathered from all the facts and circumstances bearing upon the transaction.¹ Where land has been sold, and by agreement between vendor and vendee, after default in payment, an absolute decree of foreclosure is entered in the vendor's favor, and he thereupon conveys to a third party, who advances the amount remaining unpaid, and accepts the conveyance for the benefit of the former vendee, he occupies the position of a mere mortgagee of such former vendee.² A deed of land with a lease back to the grantor containing a clause for redemption by the payment of a specified amount within a specified time is a mortgage.³

§ 1113. Deed to administrator.—Two persons occupied the position of coadministrators of an estate. One of them made a deed of land to the other, describing him as the administrator of the estate. The grantor having died, a suit was brought by his heirs and representatives to have the deed declared to be a mortgage. The facts were, that the deed was intended only as security for the repayment of funds of the estate used in paying the purchase money; the grantor continued to reside on the land; he paid taxes on the property, and erected permanent improvements. After the death of the grantor, the grantee stated to a person who desired to buy the property, that he thought he had a mortgage on the property, but, after examining his papers, he ascertained that he had a deed. This statement was not denied or explained by the grantee. The court held that while the evidence must be clear and convincing, yet, that under the circumstances, the deed should be considered to be a mortgage.⁴

¹ *Stephens v. Allen*, 11 Or. 188; *Horbach v. Hill*, 112 U. S. 144; *Albany & Santiam Water Ditch Co. v. Crawford*, 11 Or. 243; *Davis v. Brewster*, 59 Tex. 93; *Shear v. Robinson*, 18 Fla. 379.

² *Hoile v. Bailey*, 58 Wis. 434.

³ *Vliet v. Young*, 34 N. J. Eq. 15; *Mobile Building etc. Assoc. v. Robertson*, 65 Ala. 382; *Blizzard v. Craig*, 7 Lea (Tenn.), 693.

⁴ *Parks v. Parks*, 66 Ala. 326.

§ 1114. **Third person disputing character of instrument.**—A third person, who does not claim title under any conveyance or purchase from the grantee under an absolute deed, cannot dispute the character of the instrument when it is claimed to be a mortgage.¹ Thus, while a grantor in an absolute deed intended as a mortgage was absent from the State, a third person took possession of the land without having a deed from the grantee. Such third person sold the land and delivered the possession to another, who erected a dwelling-house and made improvements upon the land, without the knowledge of the grantor, and without any surrender of possession on his part. A suit was brought to recover possession from the latter by the grantor. The defense made was, that possession could not be recovered on the mere showing that the deed was a mortgage. But the court held that the action could be maintained. The court said: "Before the adoption of the code, in an action of this sort, the plaintiff would not have been permitted to show that his deed was a mortgage. The action being an action at law, strictly, he would have been bound by the legal effect of the deed, according to its terms, unless before suing in ejectment, he had obtained a decree in equity declaring the true nature of the instrument. Equitable principles are applicable to actions under the code, which was designed to simplify the remedies of parties, and to enable them to obtain in one procedure what before could have been accomplished only by a resort to two tribunals; but it was not intended to modify the rules of right, and permit the recovery, in the action of the code, of any relief on terms on which neither law nor equity would before have granted it."²

§ 1115. **Whenever a debt exists, transaction is a mortgage.**—"It is essential to a mortgage that there should

¹ *Parker v. Hubble*, 75 Ind. 580.

² *Parker v. Hubble*, 75 Ind. 580, 583, per Woods, J. And see *Healey O'Brien*, 66 Cal. 517.

be a debt to be secured. It may be antecedent to or created contemporaneously with the mortgage.”¹ It is not requisite, however, that there should be any note or agreement to pay the debt, and therefore the nature of the transaction must be determined by the facts and circumstances attending it; if it does not appear that a debt or loan was the consideration for the conveyance, it will be difficult to declare it a mortgage.² Where an absolute deed is made, not as security for the payment of an existing debt, but is made and accepted as paying or discharging it, an agreement to reconvey in a certain time and for a certain sum does not make a mortgage. The arrangement is a conditional sale, and the grantee’s title can be defeated only by a compliance with the terms of the agreement.³ Thus, where the consideration for a deed

¹ *Snavelly v. Pickle*, 29 Gratt. 35; *McNamara v. Culver*, 22 Kan. 661; *Loving v. Milliken*, 59 Tex. 423; *Glover v. Payn*, 19 Wend. 518; *Lodge v. Turman*, 24 Cal. 385; *Landers v. Beck*, 92 Ind. 49; *Stryker v. Hershy*, 38 Ark. 264; *Ahern v. McCarthy*, 107 Cal. 382.

² *Overstreet v. Baxter*, 30 Kan. 55; *Flagg v. Mann*, 14 Pick. 467; *Galt v. Jackson*, 9 Ga. 151; *Conway v. Alexander*, 7 Cranch, 218; *Lund v. Lund*, 1 N. H. 39; 8 Am. Dec. 29; *McDonald v. Kellogg*, 30 Kan. 170.

³ *Honore v. Hutchings*, 8 Bush, 687; *Hall v. Savill*, 3 Greene, G. 37; 54 Am. Dec. 485; *Stinchfield v. Milliken*, 71 Me. 567; *Magnusson v. Johnson*, 73 Ill. 156; *Spence v. Steadman*, 49 Ga. 133; *Morrison v. Brand*, 5 Daly. 40; *Ruffier v. Womack*, 30 Tex. 332; *Glover v. Payn*, 19 Wend. 518; *Slowey v. McMurray*, 27 Mo. 113; 72 Am. Dec. 251; *O’Neill v. Capelle*, 62 Mo. 202; *Pitts v. Cable*, 44 Ill. 103; *Haynie v. Robertson*, 58 Ala. 37; *West v. Hendrix*, 28 Ala. 226; *French v. Sturdivant*, 8 Me. 246; *Smith v. Crosby*, 47 Wis. 160; *Snavelly v. Pickle*, 29 Gratt. 27; *Hillhouse v. Dunning*, 7 Conn. 139; *Murphy v. Purifoy*, 52 Ga. 480; *Mobile Building & Loan Association v. Robertson*, 65 Ala. 382; *Vincent v. Walker*, 86 Ala. 333; 5 So. Rep. 465; *Booker v. Waller*, 81 Ala. 549; 8 So. Rep. 225; *Perdue v. Bell*, 83 Ala. 396; 3 So. Rep. 698; *Robinson v. Farrelly*, 16 Ala. 475; *McMillan v. Jewett*, 85 Ala. 476; 5 So. Rep. 145; *Tisdale v. Maxwell*, 58 Ala. 42; *Adams v. Pilcher*, 92 Ala. 478; 8 So. Rep. 757; *Turner v. Wilkinson*, 72 Ala. 364; *Bridges v. Lindner*, 60 Iowa, 190; 14 N. W. Rep. 217; *Hughes v. Sheaff*, 19 Iowa, 335; *Union Mut. Life Ins. Co. v. Slee*, 110 Ill. 35; *Freer v. Lake*, 115 Ill. 662; 4 N. E. Rep. 512; *Rue v. Dole*, 107 Ill. 275; *Sutphen v. Cushman*, 35 Ill. 186; *Batcheller v. Batcheller*, 144 Ill. 471; 33 N. E. Rep. 24; *Fisher v. Green*, 142 Ill. 80; 31 N. E. Rep. 172; *Kleinschmidt v. Kleinschmidt*, 9 Mont. 477; *Stryker v. Hershy*, 38 Ark. 264; *Voss v. Elder*, 109 Ind. 260; 10 N. E. Rep. 74; *Rogers v. Beach*, 115 Ind. 413; 17 N. E. Rep. 609; *Reed v. Reed*, 75 Me.

absolute in form was an old debt, the amount paid being a fair price, and there was no agreement for repurchase at the time, but afterward an agreement was made for a

264; *Gassert v. Bogk*, 7 Mont. 585; 19 Pac. Rep. 281; *Gray v. Shelby*, 83 Tex. 405; 18 S. W. Rep. 809; *Odell v. Montross*, 68 N. Y. 499; *Kraemer v. Adelsberger*, 122 N. Y. 469; 25 N. E. Rep. 859; *Hoile v. Bailey*, 58 Wis. 434; *Kerr v. Hill*, 27 W. Va. 576; *Davis v. Demming*, 12 W. Va. 246; *Hoffman v. Ryan*, 21 W. Va. 415. A member of a limited partnership, whom we shall designate as A, held the title to certain real estate in his own name, but it constituted partnership property, and he held the title for the benefit of the firm. The special partner, whom we shall designate as B, withdrew from the firm, thereby dissolving it, and at that time the firm was indebted to him in the sum of sixty thousand dollars. A executed to B a deed of the property, which was dated March 21, 1871, and was recorded on the following day. This deed was absolute on its face, but an instrument dated April 1, 1871, was executed by all the members of the firm, reciting the indebtedness of the firm to B, and that the latter "receives and takes" from A the deed and also other deeds of real estate held by A and conveyed in the same manner, as security for the payment of thirty thousand dollars of such indebtedness; B to hold the property as trustee only for the firm. For the balance of the indebtedness B took the notes of the firm. It was stated in the instrument that the understanding was that B should pay over to his copartners whatever he realized from a sale of the real estate transferred to him, over this sum of thirty thousand dollars, and the copartners agreed that if this sum should not be realized they would pay the balance, and the sale was to be made within two years. It was also agreed that the firm was to retain possession of the property, collect the rents, and pay taxes and interest on a mortgage resting on the property. The net proceeds were to be paid to B, and applied toward the discharge of the secured indebtedness. B was not to sell the lands without the consent of the firm for a less sum than the sums mentioned in the several deeds, as the consideration, and it was provided that if he should make a sale at a less sum he should be charged with the difference. B died, and his executor, treating the deed and defeasance as a mortgage, conveyed B's interest in them to C, who commenced an action for foreclosure. C obtained judgment, became the purchaser at the sale thereunder, received the referee's deed, and subsequently conveyed the property to D. A contract was made with E for the sale of the property, but he refused to accept a deed on the ground that the title was defective, claiming that upon the death of B the title vested in his heirs, and that, because the heirs were not made parties in the foreclosure suit, they were not affected by it. E brought an action to recover back the sum paid by him upon the execution of the contract of sale and expenses. It was found by the referee that the defeasance was executed "on or about the date of the delivery" of the deed. The court held, on appeal, that it was to be assumed that the defeasance, and acceptance and delivery of the deed, were contemporaneous, and that the deed never took effect until the

reconveyance, on payment of the exact sum to which the old debt, if it had not been paid, would have come, the presumption was said to be that the conveyance was not a mortgage.¹ A grantee under an absolute deed executed an agreement, in which he stipulated that if the grantor within a prescribed time should return the consideration, with interest, he would deliver up the deed, but in case of the grantor's failure to do so he should lose all claim to the deed. The court held that as there was no debt secured, this agreement was not the defeasance of a mortgage, but a contract to reconvey.² If the deed absolute in form was in fact intended as a mortgage, it may be

defeasance was executed. The two instruments, notwithstanding the difference in their dates, it was held, were to be taken and read together, and when so read they constituted a mortgage, in a suit for a foreclosure of which the heirs of B were not necessary parties. Accordingly the title was held to be good, and the action brought by the purchaser could not be maintained: *Kraemer v. Adelsberger*, 122 N. Y. 467.

A had a tax deed to land, and, believing such title to be invalid, desired to secure the land for the purpose of cutting the timber therefrom and selling it to B, who was a mill-owner engaged in manufacturing lumber in that vicinity. A wrote to the owner of the land in B's name and with his consent, seeking to purchase it. Subsequently B purchased the land, paid the price agreed on therefor, and took the deed in pursuance of an agreement between him and A that the latter would cut the timber thereon and deliver it to B at his mills at a price agreed on, and that A should receive credits for the value of the lumber so delivered upon the amount advanced by B for the land until full payment was made, when B would convey the land to A; and it was agreed that in the meantime B should hold the title as security for the moneys advanced by him. It was held that B was a mortgagee: *Stark v. Redfield*, 52 Wis. 349. See *Wells v. Morrow*, 38 Ala. 125.

¹ *Calhoun v. Lumpkin*, 60 Tex. 185.

² *Reading v. Weston*, 7 Conn. 143; 18 Am. Dec. 89. See *Parson v. Seay*, 35 Ala. 612. But wherever there is a recognition of a debt by the parties, an agreement of this character constitutes the transaction a mortgage: *Alstin v. Cundiff*, 52 Tex. 453; *Montgomery v. Chadwick*, 7 Iowa, 114. A bond was executed by a grantee reciting the deed to him and the indebtedness of the grantor. It provided that if the debt were discharged on or before a certain time, the bond should be void, but that it should continue in force if the grantee should refuse to reconvey the land upon payment. The transaction was held to be a mortgage: *Van Wagner v. Van Wagner*, 7 N. J. Eq. (3 Halst.) 27. See *Henley v. Hotaling*, 41 Cal. 22.

treated as a mortgage in proceedings to foreclose.¹ And in the case of an insolvent estate, a deed made as security, for a loan may be treated as a mortgage, in a suit by the administrator of the estate of the grantor, for the benefit of the grantor's creditors.² If after the execution of the deed the parties to it still understand that the relation of debtor and creditor continues, this understanding should certainly be regarded as a strong reason for the belief that the deed was intended to be a mortgage.³

§ 1116. Voluntary deed and agreement for mortgage. Where a deed is made at the request of a husband to his wife, and she parts with nothing for the conveyance, the property is not to be protected in her hands by those rules applicable in ordinary cases to the property of married women. Thus, in such a case, the husband gave his notes for the price, and signed a written agreement, to which, however, his wife was not a party, to execute with her a mortgage back after increasing a prior mortgage to a sufficient amount to repair the buildings. The prior mortgage was increased, and the wife then declined to execute a second mortgage in compliance with the agreement made by the husband. It appeared that she did not know of the agreement to give the mortgage when she accepted the deed, but in a suit to compel her to execute the mortgage, it was held that this fact made no difference, as, when she learned of the agreement, she could have surrendered the property, and in that event she would have occupied no worse position than when the deed was given. If she did not wish to do this she ought to perform the agreement which formed a material part of the consideration for the deed.⁴

§ 1117. Absolute deed made upon application for loan.—Where a person, who appears to be a grantor, de-

¹ *Herron v. Herron*, 91 Ind. 278.

² *Reed v. Reed*, 75 Me. 264.

³ *Budd v. Van Orden*, 33 N. J. Eq. 143.

⁴ *Hall v. Hall*, 50 Conn. 104.

sired in the inception of the transaction to borrow money, and obtains the money, courts are inclined to say that the parties have made a mortgage, although the transaction may have assumed the form of a sale.¹ "The circumstance that there were negotiations for a loan, or the admission by the grantee that he loaned the money to the grantor, is a strong circumstance to show that the real transaction was a mortgage, and not a conditional sale."²

¹ *Russell v. Southard*, 12 How. 139; *Holmes v. Grant*, 8 Paige, 243; *Parmelee v. Lawrence*, 44 Ill. 405; *Brown v. Nickle*, 6 Pa. St. 390; *Miller v. Thomas*, 14 Ill. 428; *Wheeler v. Ruston*, 19 Ind. 334; *Davis v. Deming*, 12 W. Va. 246; *Cross v. Hepner*, 7 Ind. 359; *Kellum v. Smith*, 33 Pa. St. 158; *Crassen v. Swoveland*, 22 Ind. 427; *Sears v. Dixon*, 33 Cal. 326. In *Miller v. Thomas*, 14 Ill. 428, there was an absolute deed and an agreement for a reconveyance within a limited time. The money not being repaid at the time agreed upon, possession was taken by the mortgagee, and the land sold to a third person. Says the court: "Upon this subject Shephard was consulted, who suggested that if he took a mortgage it would take as long to collect it as it would to sue the note. He then said he would *buy* the land, but in such a way that he could sell it at a certain day, for he would not have his money out of his hands beyond his control. The result was a conveyance of the land from Edwards, and an agreement for a resale or conveyance upon the payment of the amount due upon a certain day. There is much evidence given of the declarations of the parties as to their intentions, made not only at the time of the transaction, but subsequently, which it is unnecessary to recapitulate minutely. As is generally observed in such cases, the strength of the declarations testified to vary very much according to the inclination of witnesses, and the form of the questions put to them eliciting the answers. Upon the whole, it is manifest that it was the intention of both parties to provide the strongest security possible for the payment of the money designed to be secured at the day stipulated, but, after all, it was only as security that the conveyance was made. While, on the one hand, Edwards (the grantor) stated, if he did not pay the money at the time agreed upon, he must lose his land, on the other, Brown stated that he held the land as security for the payment of the money. . . . In cases of this sort, the real character of the arrangement may as often be gathered from the nature of the transaction and character of the circumstances as from the express declarations of the parties. These when considered can leave the mind in but little doubt on the subject. It is manifest beyond contradiction, that Brown did not wish to become the real purchaser of the land, but he wanted his money at the time agreed upon. Edwards did not wish to part with the land, but desired to give Brown the most perfect security upon it that the money should be promptly paid."

² *Davis v. Deming*, 12 W. Va. 246, 283, per Green, J. In *Locke v. Palmer*, 26 Ala. 312, the court observes: "There are, in most cases of

§ 1118. **Presumption of loan.**—As the intention of the grantor in the beginning was to borrow money, the presumption is natural, unless an alteration of this intention is shown, that any transfer made of his property, connected with negotiations for borrowing money, was made as security for a loan.¹ And this is true, though a different consideration than the one first sought be recited in the deed. The parties having treated as

this character, no tests which will enable a court to determine with anything like positive certainty, whether a mortgage or a conditional sale was intended; but the inclination of equity in such cases is always to lean against the latter, for the reason that an error which converted the transaction into a mortgage would not be as injurious as a mistake which changed a mortgage into a conditional sale; and this leaning is strongly manifested whenever the contract had its origin in a proposition for a loan, or the relation of debtor and creditor existed between the parties; these circumstances being regarded as amongst the circumstances tending to show that a mortgage was intended."

¹ *Davis v. Hemenway*, 27 Vt. 589; *Anon.*, 2 Hayw. (N. C.) 26; *Crews v. Treadgill*, 35 Ala. 334, 344. In the latter case the court said: "This case, then, furnishes most of the evidences of a mortgage. It originated in a loan of money; the possession of the premises remained with the grantor by the permission of the grantee, and the amount of money advanced was little, if any, more than half the then market value of the lands." This case approves the earlier decision of *Locke v. Palmer*, 26 Ala. 312.

In *Smith v. Sackett*, 15 Ill. 528, the court said (p. 533), per Scates, J: "Though the loan was refused in the usual form on a note or mortgage, yet they made no particular objection to receiving it in the form of a bond for a deed from the lender. It is very apparent that Sackett preferred and insisted upon this form, under the impression that upon a failure of payment it gave him the advantage of raising the amount by sale to another, supposing the *form* of the transaction conclusive of its true character. It was in this, if at all, he committed his mistake. Courts will look behind and outside of deeds to ascertain whether they were intended as mortgages, although absolute upon their face; and when that character is established, it will ever be treated as a mortgage."

In *Davis v. Hopkins*, 15 Ill. 519, in a similar case, the court said: "Indeed it seems to be a device resorted to for the concealment of usury, or hard and unconscionable terms, but it is destined to defeat. Whenever its true character may be reached and exposed by proofs, I do not perceive that it opens the door any wider than it already stands to combinations of fraud and perjury. All our transactions are liable to the same where we are destitute of evidence for their exposure; and the remedy proposed by disregarding would equally apply and exclude all testimony, verbal or written, because it might be the result of combination, fraud, deceit, perjury, and forgery."

borrower and lender, the conveyance will be considered a mortgage, unless it appear that they afterward contracted for a sale of the property without reference to the loan.¹ In a case in New York, where an absolute deed was held to be a mortgage, the court, speaking of the circumstances

¹ *Morris v. Nixon*, 1 How. 118. And see *Sweetzer's Appeal*, 71 Pa. St. 264; *Leahigh v. White*, 8 Nev. 147; *Dwen v. Blake*, 44 Ill. 135; *Tibbs v. Morris*, 44 Barb. 138; *Richardson v. Barrick*, 16 Iowa, 407; *Smith v. Doyle*, 46 Ill. 451; *Knowlton v. Walker*, 13 Wis. 264; *Phillips v. Hulsizer*, 20 N. J. Eq. 308; *Marvin v. Prentice*, 49 How. Pr. 385; *Fiedler v. Darrin*, 50 N. Y. 437, 441.

In *Preschbaker v. Feaman*, 32 Ill. 475, one Servant was employed by the parties to draw the papers between them. In his testimony he said that he first drew a conditional deed, but the parties preferred a regular deed with an agreement for a reconveyance, and he drew the papers accordingly. Several witnesses who were present at the negotiations testified that Preschbaker desired to *sell* the farm. Others testified that Preschbaker had frequently said that he had sold the farm. The lower court regarded the transaction a conditional sale, and dismissed the bill to redeem. On appeal the Supreme Court reversed the judgment, saying: "To determine whether such a transaction is a sale, or a mortgage to secure the payment of the money advanced, the intention of the parties at the time must control. To ascertain that intention, the transaction must be viewed in the light of all the surrounding circumstances. In equity, the form of the transaction is not regarded, but the substance must control. . . . In such a case all of the attendant circumstances will be considered in ascertaining the true character of the transaction. It is from them the intentions of the parties can be ascertained. . . . It then remains to determine whether the evidence in this case brings it within the rule; whether it is shown to have been designed as a mortgage or a conditional sale. Both instruments having been executed at the same time, must be regarded as forming but one transaction, and they seem rather to indicate a loan and mortgage than a purchase and resale. Such purchases and resales are not of frequent occurrence, while such mortgages are usual." The court, after reviewing the evidence, said: "And whilst the evidence is somewhat conflicting, yet when all of the circumstances are considered, we cannot avoid the conclusion that it was designed as a mortgage to secure a loan." See, also, *Harbison v. Houghton*, 41 Ill. 529; *Whitcomb v. Sutherland*, 18 Ill. 578; *Coates v. Woodworth*, 13 Ill. 654.

In *Ruckman v. Alwood*, 71 Ill. 155, one A. J. Alwood was persecuted by mob violence, which resulted in the burning of his crops. His lands were new, and he was embarrassed for means to develop them. Ruckman, a man of wealth, was a cousin, and professed a friendly interest in Alwood. He suggested to Alwood the idea of conveying the property to him as a means of avoiding these persecutions. Ruckman advanced money, and took an absolute deed. Alwood frequently said to the neighbors that,

that led it to that conclusion, said: "The application here was for a loan, and all the negotiations were, in respect to the form of the security, upon the premises in question; and there was no treaty for a purchase by the plaintiff, and no pretense that the defendants would have sold the premises for the sum actually advanced by the plaintiff, or for twice that amount. The time of repayment was the day fixed by the borrower on the first application; and the amount to be repaid, the principal sum advanced, and the ten per cent proposed to be paid, and which the plaintiff was so willing to receive."¹

although he was still in possession, he had ceased to have any interest in the lands or the products, but had sold the premises to Ruckman. Ruckman attempted to treat the deed as absolute, but the court held it to be a mortgage.

¹ Fiedler v. Darrin, 50 N. Y. 438, 442. An agreement for a sale of land for which a deed is to be executed in two years, with an indorsed agreement by the vendee to cancel the agreement on repayment of the price, with interest, by the vendor, within two years, is a mortgage: Brown v. Nickle, 6 Pa. St. 390. In Kerr v. Gilmore, 6 Watts, 405, the court says (p. 407): "The result of these cases seems to be that, if the agreement is in substance a loan of money, no management or contrivance of the lender; no form of expression in the instruments; not even dating the defeasance several days after the deed; not even the lender uniformly stating that he will not have a mortgage, will avail. A sale in form, but which in fact and substance may be avoided by the payment of money within a given time, is and will be held to be a mortgage; if a mortgage until that period elapses, it must continue a mortgage until lapse of time or some other matter changes it. In different cases we find different particulars stated as being *criteria*, by which to distinguish whether the instrument be a mortgage or an absolute sale. Each of these may have weight; but it is not safe to designate the insertion or omission of any one clause or circumstance as conclusive, for that would be adopted by the rapacious, and submitted to by the needy, and the wholesome rules now established would become useless." The court, conceding that the parties in a fair case may make a conditional sale, continues: "The authorities, however, say that, even when the matter assumes this appearance, the courts are bound to scrutinize the transaction with great care, and to be watchful that it was not originally a loan of money; and when we consider that many of those who lend are astute to devise some mode by which to become absolute owners, if the money be not repaid at the day, this caution would seem to be necessary": See People v. Irwin, 14 Cal. 428; Kelloran v. Brown, 4 Mass. 443; Eaton v. Green, 22 Pick. 526; Colwell v. Woods, 3 Watts, 188; 27 Am. Dec. 345; Poindexter v. McCannon, 1 Dev. Eq. 373; 18 Am. Dec. 591; Crane v. Bonnell, 1 Green Ch. 264.

§ 1119. **Sale may have been made.**—But it does not by any means follow that because the transaction began by an application for a loan, a loan was made. An application of this character may terminate in either an absolute or conditional sale. Undoubtedly, courts will carefully scrutinize all transactions where a sale has been the result of negotiations initiated by an application for a loan. Yet when it clearly appears a sale was intended, it will be upheld.¹ Where a mortgagor applied to the mortgagee for a second loan, and the latter refused to give him the money, but agreed to purchase the land, giving up the first mortgage and paying the additional sum sought by the mortgagor, and agreed also that the mortgagor might repurchase within six months on repayment of both the original loan and the additional sum paid, the transaction was held to be a sale with a right of repurchase, and not a mortgage.²

§ 1120. **Delivery of deed in payment of debt.**—An agreement by a grantee under an absolute deed, delivered in payment of a debt made at the same time as the deed, to reconvey upon receiving within a stipulated time an amount equal to the debt and interest, does not necessarily constitute the transaction a mortgage. The test in all these cases is the existence of a debt. Wherever there is a debt which may be the subject of an action, the deed must be declared a mortgage. But where the conveyance discharges the debt, and this is the intention of the parties, so that an action could not be maintained to recover the debt, it being paid, the sale must be held absolute.³ Where the title has been transferred by an actual

¹ *Turner v. Kerr*, 44 Mo. 429; *Holmes v. Fresh*, 9 Mo. 201, 206; *Flagg v. Mann*, 14 Pick. 467; *McDonald v. McLeod*, 1 Ired. Eq. 221; *De France v. De France*, 34 Pa. St. 385.

² *Adams v. Adams*, 51 Conn. 544.

³ *Page v. Vilhac*, 42 Cal. 75; *Farmer v. Grose*, 42 Cal. 169; *Morrison v. Brand*, 5 Daly, 40; *Weathersly v. Weathersly*, 40 Miss. 462; 90 Am. Dec. 344; *Turner v. Kerr*, 44 Mo. 429; *Hoopes v. Bailey*, 28 Miss. 323; *Baughner v. Merryman*, 32 Md. 185. In *Farmer v. Grose*, 42 Cal. 169, the court said: "In cases of this class the well-established test by which to

sale, a contract by the purchaser for a resale of the property, within a specified time, for the price that he paid, does not change the transaction into a mortgage.¹ The essential fact to be determined is, whether the conveyance operates as a discharge of the debt. If the indebtedness remains uncanceled, the conveyance is treated in equity as a mortgage, though the grantee may not regard it as such. But he cannot hold the absolute title without at the same time relinquishing the right to compel payment of the debt.² The fact that the vendee maintains possession for a long time without the payment of interest or rent, and the relation of debtor and creditor is not recognized in the subsequent dealings of the parties, tends to show that the transaction was not a mortgage.³ Where the relation of debtor and creditor continues, the grantee possesses the right to call upon the grantor for any deficiency arising upon a foreclosure and sale. Unless he has this right, an agreement to reconvey with the deed creates a conditional sale.⁴ A mortgagor executed a quitclaim deed to the mortgagee, who held two overdue mortgages on the land, the grantor taking back a lease. There was a provision for a reconveyance if he, the grantor and debtor, should pay the debt within a time specified, and the old notes and mortgages were not surrendered. The

determine whether the transaction is a mortgage or a defeasible sale is the fact whether or not, notwithstanding the conveyance, there is a subsisting continuing debt from the grantor to the grantee. If the consideration for the conveyance was an antecedent debt, and the property is to be reconveyed on the payment of the debt with interest, and nothing more appears, *prima facie* the transaction would be a mortgage. In like manner, if there was no antecedent debt, but a loan of money to be repaid with interest, and such was the real intention and understanding of the parties, it would be a mortgage and not a defeasible sale, whatever may be the terms employed in the contract."

¹ *Mason v. Moody*, 26 Miss. 184; *Porter v. Nelson*, 4 N. H. 130.

² *Sutphen v. Cushman*, 35 Ill. 186.

³ *O'Reilly v. O'Donoghue*, Ir. Rep. 10 Eq. 73.

⁴ *Robinson v. Cropsey*, 2 Edw. Ch. 138; *Blakemore v. Byrnside*, 7 Ark. 505; *Slowey v. McMurray*, 27 Mo. 113; 72 Am. Dec. 251; *Johnson v. Clark*, 5 Ark. 321; *Saxton v. Hitchcock*, 47 Barb. 220; *De Bruhl v. Maas*, 54 Tex. 464; *Porter v. Clements*, 3 Ark. 364. See *Usher v. Livermore*, 2 Iowa, 117.

court held that the instrument was to be treated as a mortgage, and not as an absolute deed.¹

§ 1120 a. Note for deficiency after payment of a pre-existing debt.—But the fact that the grantee in the deed takes a note from the grantor does not of itself show that the deed is intended as a mortgage. The fact to be determined is whether the property is conveyed by the grantor and accepted by the grantee in total or partial payment of the debt. Prior to the execution of a deed, the grantors were indebted to the grantees in the sum of eighteen hundred dollars, and the deed was given in satisfaction of such indebtedness, and, at the time of the execution of the deed, the grantors gave to the grantees their note for five hundred dollars, with the understanding that if, from a sale of the land conveyed, the sum of eighteen hundred dollars and interest thereon should not be realized, then the note should be paid, but not otherwise. If a greater sum were obtained, or if, after that sum was realized, any land remained, the surplus of land or money it was agreed should belong to the grantors. The court held that the agreement did not constitute the deed a mortgage. The note for five hundred dollars was executed merely for the purpose of rendering certain the full realization of the antecedent indebtedness, if the land conveyed when sold should not realize that sum.²

§ 1121. Purchase of mortgaged premises by mortgagee.—A mortgagee has the right to purchase the mortgaged premises. If the deed made to him is in satisfaction of the mortgage debt, the deed does not thereby become a mortgage. An owner of land had made deeds of trust and had not paid the interest or taxes for four years. On receiving notice that the property would be sold, he stated that he preferred to make a deed for the property rather than to have a sale take place under the trust deeds or on foreclosure. Finally the amount due was determined,

¹ *Bearss v. Ford*, 108 Ill. 16.

² *Manasse v. Dinkelspiel*, 68 Cal. 404.

and he executed a deed absolute in form for the property. But he took back a contract to convey the land to him upon the payment of the amount found to be due within one year. He executed, however, no new obligation, and his notes and deeds of trust were surrendered, and the trust deeds were satisfied on the records. This transaction was held to be a sale of the equity of redemption, and not in any sense a mortgage.¹

§ 1122. **Liability for taxes.**—Where no agreement exists to the contrary, the grantee of a deed absolute in form but intended as a mortgage is liable as between himself and grantor, according to a somewhat late decision in Maryland, to pay the taxes on the property which have accrued after the date of the deed.²

§ 1123. **Comments.**—The decision in the case cited in the preceding section undoubtedly would be good law in California, where by force of constitutional provisions the mortgagee is compelled to pay the taxes on his mortgage, which for the purposes of assessment and taxation is deemed and treated as an interest in the property affected thereby.³ But in other States, where the mortgage is not taxed to the mortgagee, it is doubtful if this de-

¹ *Rue v. Dole*, 107 Ill. 275. "No new note was given," said Mr. Justice Craig, "nor was there any agreement by Rue to pay the executor a single dollar. The contract given to him does not bind him to make any payment whatever, but it merely provides that the executor shall convey the premises to him, *provided he pays* a certain amount at a certain time. If, then, there was no debt due from Rue to the executors, how could the deed and contract be held to be a mortgage? The land could not be conveyed as security for a debt, because there was no debt to secure. Suppose the complainants had, after the deed and contract were executed, and after the time for a conveyance had expired, sued the defendant in an action at law to recover the amount of the original indebtedness, could the action have been maintained? We think not, for the reason the land was conveyed in satisfaction of the indebtedness. And where a plea of payment would operate as a bar to an action of that character, for the reason the conveyance had extinguished the debt, the transaction may be regarded as an absolute sale."

² *Davis v. Hall*, 52 Md. 673.

³ Cal. Const. art. xiii, §§ 4, 5.

cision would be regarded as correctly stating the law. If a deed absolute in form is in fact a mortgage, it should be treated as a mortgage for all purposes, and all the consequences that attach to a mortgage, such in form, should also attach to an instrument which in substance is a mortgage, regardless of what its form may be. It seems to the author, that if the grantee is declared to be a mortgagee, he should not occupy a worse position than he would have occupied had the instrument been in the form of a mortgage; and hence, it would seem reasonable, in those States where no deduction is made in favor of the mortgagor for mortgages on his property, that he should be chargeable with the taxes paid by the grantee under an absolute deed intended as a mortgage.

§ 1124. **Third person as purchaser.**—If a third person is induced to become a purchaser, and he agrees to convey the premises to the person inducing him to purchase on the payment of a certain sum to him within a certain time, the agreement must be complied with, or all rights to purchase under it are forfeited.¹ A conditional sale and not a mortgage must be the result where the relation of debtor and creditor is not created.² But in equity, if the debtor has any interest in the property, legal or equitable, and obtains a conveyance for a person who advances money therefor, upon an understanding that the title shall be transferred to him upon paying the money advanced, he has the right to redeem from the grantee, who, having secured the title by his act, holds it as his mortgagee.³ Where a person has a contract for

¹ *Hill v. Grant*, 46 N. Y. 496; *Stephenson v. Thompson*, 13 Ill. 186; *Hull v. McCall*, 13 Iowa, 467; *Roberts v. McMahan*, 4 Greene, G. 34.

² *Humphrey v. Snyder*, 1 Morris, 263; *Galt v. Jackson*, 9 Ga. 151; *Chapman v. Ogden*, 30 Ill. 515. See *Carr v. Rising*, 62 Ill. 14; *Smith v. Sackett*, 15 Ill. 528.

³ *Houser v. Lamont*, 55 Pa. St. 311; 93 Am. Dec. 755; *Stoddard v. Whiting*, 46 N. Y. 627; *Turner v. Wilkinson*, 72 Ala. 361; *Wright v. Shumway*, 1 Biss. 23; *Carr v. Carr*, 52 N. Y. 251; *Lindsay v. Matthews*, 17 Fla. 575; *Hoile v. Bailey*, 58 Wis. 434; *Fisk v. Stewart*, 24 Minn. 97; *McBurney v. Wellman*, 42 Barb. 390; *Stinchfield v. Milliken*, 71 Me. 567.

the purchase of land, and procures another who takes the deed in his own name to advance the money, the latter is a mortgagee, and his rights and obligations are the same as they would be if the land had been transferred to him by the debtor.¹ But then the person procuring another to purchase land must have either an equitable or legal interest in it, to cause an agreement by the purchaser to convey upon being reimbursed, to constitute the transaction a mortgage. When there is no such interest, the transaction will be regarded as a mere contract of sale.² Where a mortgagor after the expiration of the statutory time was allowed to redeem, another person advancing the money, and the mortgagee executed a quitclaim conveyance to the mortgagor, and the latter executed an absolute deed to the person advancing the money, and received back a written agreement giving a certain time to redeem on payment of the money advanced, the conveyance in equity was deemed a mortgage.³

§ 1125. Agreement to reconvey showing absolute sale.—In the majority of cases, the agreement for repurchase does not attempt to define the transaction either as a conditional sale or a mortgage. A statement in the agreement for a reconveyance that it is not to be construed so as to make the transaction a mortgage, is not conclusive on the court. But where the contract for repurchase shows upon its face that the parties actually intended to make an absolute sale, giving the vendor an option to repurchase, it will be so construed when its provisions and the idea that a mortgage was intended are inconsistent.⁴ A recital in an absolute deed

¹ *Hidden v. Jordan*, 21 Cal. 92; *Strong v. Shea*, 83 Ill. 575; *Smith v. Knoebel*, 82 Ill. 392; *Brumfield v. Boutall*, 24 Hun, 451; *Barnett v. Nelson*, 46 Iowa, 495; *Hardin v. Eames*, 5 Bradw. (Ill.) 153. And where the grantee advances only part of the purchase money, he has a lien upon the whole land, and not merely upon a proportionate undivided interest: *Hidden v. Jordan*, *supra*.

² *Caprez v. Trover*, 96 Ill. 456; *McClintock v. McClintock*, 3 Brewst. 76. See *Penn. Life Ins. Co. v. Austin*, 42 Pa. St. 257.

³ *Turner v. Wilkinson*, 72 Ala. 361.

⁴ *Hanford v. Blessing*, 89 Ill. 188; *Smith v. Crosby*, 47 Wis. 160.

that it was executed to secure a loan of money, shows that the deed upon its face is a mortgage.¹ If the instrument, however, contains a declaration that it is a conditional deed and not a mortgage, and that it is to be absolute if the sum specified is not paid at the time limited, it is held that it is to be construed as a conditional deed and not a mortgage.² Where the grantor claims after the transaction had been consummated that it was a mortgage, while in fact it was a sale, a bill in equity may be maintained by the grantee to have it adjudged a sale.³ The right to redeem from a mortgage exists until it has been taken away by foreclosure, but in the case of a conditional sale, the contract of the parties will be enforced, and there can be no redemption after the day fixed for payment.⁴ A deed was executed, and the grantee agreed in writing to pay certain debts of the grantor, and the grantor was to repay the amount in a specified time, with

¹ *Montgomery v. Chadwick*, 7 Iowa, 114.

² *Burnside v. Terry*, 45 Ga. 621. The terms of an agreement may be so convincing that the transaction was a sale, that while not conclusive, very little additional evidence to this effect may lead to that conclusion: *Hanford v. Blessing*, 80 Ill. 188. Effect should be given to an express provision that an agreement for reconveyance should be deemed only a contract to reconvey, and not as an acknowledgment that the deed was intended as a mortgage, if consistent with the whole transaction: *Ford v. Irwin*, 18 Cal. 117. See *Hickox v. Lowe*, 10 Cal. 197; *Bishop v. Williams*, 18 Ill. 101; *Snyder v. Griswold*, 37 Ill. 216.

³ *Rich v. Doane*, 35 Vt. 125; *Gussert v. Bogk*, 7 Mont. 585; 19 Pac. Rep. 281; *Kahn v. Weil*, 42 Fed. Rep. 704; *Manasse v. Dinkelspiel*, 68 Cal. 404; 9 Pac. Rep. 457.

⁴ *People v. Irwin*, 14 Cal. 428; *Henley v. Hotaling*, 41 Cal. 22; *Cornell v. Hall*, 22 Mich. 377; *Joy v. Birch*, 4 Clark & F. 57; *Ensworth v. Griffiths*, 1 Brown Parl. C. 149; *Pegg v. Wisden*, 16 Beav. 239; *Perry v. Meddowcroft*, 4 Beav. 197; *Barrell v. Sabine*, 1 Vern. 268; *Holmes v. Grant*, 8 Paige, 243; *Glover v. Payn*, 19 Wend. 518; *Brown v. Dewey*, 2 Barb. 28; *Hanford v. Blessing*, 80 Ill. 188; *Pitts v. Cable*, 44 Ill. 103; *Dwen v. Blake*, 44 Ill. 135; *Shays v. Norton*, 48 Ill. 100; *Carr v. Rising*, 62 Ill. 14; *Haines v. Thomson*, 70 Pa. St. 434; *Rich v. Doane*, 35 Vt. 125; *Trucks v. Lindsay*, 18 Iowa, 504; *Merritt v. Brown*, 19 N. J. Eq. 287; *Ransome v. Frayser*, 10 Leigh, 592; *Moss v. Green*, 10 Leigh, 251; 34 Am. Dec. 731; *Schreiber v. Le Clair*, 66 Wis. 579; 29 N. W. Rep. 570, 899. The privilege to repurchase may be a personal one, which cannot be enforced in case of the death of the grantor: *Newton v. Newton*, 11 R. I. 390; 23 Am. Rep. 476.

interest, and, upon repayment, the grantee was to reconvey to the grantor. The transaction, the court held, constituted a conditional sale and not a mortgage.¹

§ 1126. **Agreement that grantee may sell.**—Where the agreement authorizes the grantee to sell the property and apply the proceeds toward the payment of the sum he has advanced, paying the residue, if any, to the grantor, the transaction is a mortgage.² But the grantee has the power to convey the estate free from the encumbrance.³ A conditional sale is not converted into a mortgage by an agreement on the part of the grantor, who is a joint tenant, not to make partition without the grantee's advice and consent.⁴ Nor does an agreement permitting the grantor, within a specified time, to sell the property for a larger sum than he received, by paying to the grantee the amount

¹ *Hays v. Carr*, 83 Ind. 275.

² *Eaton v. Whiting*, 3 Pick. 484; *Kidd v. Teeple*, 22 Cal. 255; *Ogden v. Grant*, 6 Dana, 473; *Hagthorp v. Hook*, 1 Gill & J. 270; *Crane v. Buchanan*, 29 Ind. 570; *Lawrence v. Farmers' Loan and Trust Co.*, 13 N. Y. 200; *Ruffners v. Putney*, 12 Gratt. 541; *Gillis v. Martin*, 2 Dev. Eq. 470; 25 Am. Dec. 729. In *Kidd v. Teeple*, 22 Cal. 255, the instrument granted, bargained, and sold a water ditch, authorized the grantees to collect the issues and profits, and, in case payment was not made, to sell the property. The court held it constituted a mortgage.

³ *Eaton v. Whiting*, 3 Pick. 484. In that case, Parker, C. J., delivering the opinion of the court, says (p. 491): "An instrument of conveyance, therefore, which appears on the face of it, or by contemporaneous instruments, to be intended as security for the payment of a debt or the performance of other conditions, does not lose this character while the estate remains in the hands of the grantee, although he may have power to convey the estate free from such encumbrance. A power to sell, executed to one who relies upon such power, and expects and intends to purchase an absolute estate, will, without doubt, pass an unconditional estate to the purchaser, though this form of conveyance is rare in this country. But while the power remains unexecuted, the relation of mortgagor and mortgagee subsists, if that was the relation created by the instrument separate from the power; but, even under such a power, it has been held in England that if the purchaser knows the original nature of the transaction, and appears not to have purchased wholly without reference to the conditional character of the title, he will be compelled in equity to surrender it on receiving the money he has advanced: See *Croft v. Powel*, 2 Com. Rep. 607."

⁴ *Cotterell v. Purchase*, For. 61; *Cas. t. Talb.* 61.

mentioned as the consideration in the deed, make the instrument a mortgage.¹

§ 1127. **Surplus after sale.**—When a deed absolute on its face is intended as a mortgage, it will be treated as such in all its aspects, and, if the property is sold, the surplus remaining after the payment of the debt may be recovered by the mortgagor.² Thus, a corporation advanced the sum of seven hundred dollars to A, for the redemption of a piece of real estate for the benefit of the owner's children, the property being subject to a deed of trust to secure a debt. The property was thereafter conveyed to A for the expressed consideration of seven hundred dollars, he agreeing, in case the property should be sold for more than the loan and other necessary expenses incurred, to pay the surplus to the children of the owner. A subsequently sold the land for the sum of twelve hundred dollars. The court held that the transaction constituted a mortgage, and that an action could properly be brought in the names of the beneficiaries of the trust to recover the difference.³ A mortgagee in possession, under a deed absolute in form, is, in case he sells the mortgaged premises, compelled to account for the amount which he received, though he may be able to show, by the opinion of competent judges, that the sum for which the property was sold exceeds its market value.⁴

§ 1128. **Agreement that grantee may buy.**—An agreement executed by the grantee contemporaneously with the execution of a deed, and as part of the transaction, by which he binds himself to account to the grantor for

¹ *Stratton v. Sabin*, 9 Ohio, 28; 34 Am. Dec. 418.

² *Bettis v. Townsend*, 61 Cal. 333. And see, also, *Hunt v. Middlesworth*, 44 Mich. 448, where a judgment had been recovered in another State for the surplus, and suit was afterward brought on this judgment in the State in which the deed was executed. In the suit based on the judgment, the offer of the grantee in the deed to show how the property was paid for when first conveyed, was held to be immaterial by reason of the judgment.

³ *Bettis v. Townsend*, 61 Cal. 333.

⁴ *Budd v. Van Orden*, 33 N. J. Eq. 143.

a portion of the profits which may be realized by him on a resale of the property, and by which he is to sell if a specified price can be secured, is not inconsistent with the vesting of the title.¹ A grantor conveyed land by an absolute deed, and the grantee on the same day executed a covenant, in which he recited that the conveyance was made for the purpose of paying a specified sum of money, and he covenanted that he would not convey the premises within one year without the consent of the grantor, and that, if the grantor should find a purchaser within that time, he would, on receiving the amount with interest for which the land had been conveyed to him, convey to such purchaser; the covenant further provided that in case such sale should not be made within the year, it should then be submitted to certain persons named to decide what additional amount should be paid by the grantee for the land, which sum he covenanted to pay; the transaction was held not to be a mortgage, and the grantee was held entitled to recover the land in ejectment.² Where a conveyance is made for the purpose of securing future loans, and there is an oral agreement to convey on reimbursement, the deed will be held to be a mortgage.³

§ 1129. Where no note is given.—It is not necessary for the creation of a mortgage that there should be a note

¹ *Macauley v. Porter*, 71 N. Y. 173. *Rapallo, J.*, delivering the opinion of the court, said: "There was no condition attached to the grant upon which it was to become void, and the property revert to the grantor. The agreement clearly shows that the title was to pass to Porter, that he should have power of disposition over it, and that all he undertook to do was to account to his grantor for one-half of the profits which might be realized by him on a resale, if made within the year, and that he would not sell within the year for less than four thousand dollars without the consent of Miss Tracy. Such an agreement is not inconsistent with the vesting of the title in him, and to record such a deed and agreement as a mortgage would have been clearly improper."

² *Baker v. Thrasher*, 4 Denio, 493. The court said: "There was no condition or agreement under which the title could ever become revested in the grantor. It was to remain in the grantee, or the person to whom he should convey in pursuance of the covenant."

³ *Madigan v. Mead*, 31 Minn. 94.

or any evidence of indebtedness. The rule is sometimes stated that every mortgage implies a loan, and every loan implies a debt.¹ The circumstance that there is no agreement for the payment of the debt may be of considerable importance as tending to show the non-existence of the relation of debtor and creditor, and that the conveyance was not intended as a mortgage.² But it is not conclusive; attention should be paid to the absence of a collateral undertaking as a circumstance only, from which the intention of the parties to make a mortgage or a sale with a contract for repurchase may be ascertained.³

§ 1130. Quitclaim deed.—Where the real intent is to secure a person for a debt due to him from the owner of land, and to give him the means of making a more rapid disposition of the property for the satisfaction of the debt, the nature of the deed that is executed is immaterial. A quitclaim deed in such a case cannot be considered as a final surrender of all the interest of the grantor.⁴ But a quitclaim deed conveys the legal title, and though it

¹ *Wright v. Bates*, 13 Vt. 341; *Flagg v. Mann*, 14 Pick. 467; *Murphy v. Calley*, 1 Allen, 107. Mr. Justice Wells, in *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671, says, on page 144: "When it is considered that the inquiry itself is supposed to be made necessary by the adoption of forms and outward appearance differing from the reality, it is hardly reasonable that the absence of an actual debt manifested by a written acknowledgment or an express promise to pay should be regarded as of more significance than the absence of a formal defeasance. . . . A mortgage may exist without any debt or other personal liability of the mortgagor. If there is a large margin between the debt or sum advanced and of the value of the land conveyed, that of itself is an assurance of payment stronger than any promise or bond of a necessitous borrower or debtor." See, also, to the effect that no written evidence is necessary: *Wing v. Cooper*, 37 Vt. 169; *Brant v. Robertson*, 16 Mo. 129; *Fisk v. Stewart*, 24 Minn. 97; *Montgomery v. Spect*, 55 Cal. 352.

² *Conway v. Alexander*, 7 Cranch, 218; *Bacon v. Brown*, 19 Conn. 34; *Horn v. Keteltas*, 46 N. Y. 605; *Jarvis v. Woodruff*, 22 Conn. 548; *Brumfield v. Boutall*, 24 Hun, 451.

³ *Murphy v. Calley*, 1 Allen, 107; *Flint v. Sheldon*, 13 Mass. 443, 448; 7 Am. Dec. 162; *Flagg v. Mann*, 14 Pick. 467; *Brown v. Dewey*, 1 Sand. Ch. 56; *Brant v. Robertson*, 16 Mo. 129; *Rice v. Rice*, 4 Pick. 349; *Kelly v. Beers*, 12 Mass. 387.

⁴ *Curtiss v. Shelton*, 47 Mich. 262. And see *Bearss v. Ford*, 108 Ill. 16.

may have been intended as a mortgage, a *bona fide* purchaser, without notice from the grantee, will take the title free from equities.¹

§ 1131. **Continued possession of grantor.**—The grantor's continuance in possession is a circumstance tending to show that the transaction is a mortgage.² "If the vendor remains in the possession of the property after the alleged sale, this is a circumstance that tends to show that it was not really a sale, but a mortgage, for such continuing possession in the vendor, after a sale, if not inconsistent with a sale, is an unusual accompaniment of it."³ A grantee, on the same day that a conveyance absolute

¹ Brophy Mining Co. v. Brophy & Dale etc. Mining Co., 15 Nev. 101.

² Hoffman v. Ryan, 21 W. Va. 415; Davis v. Deming, 12 W. Va. 246; Lawrence v. Dubois, 16 W. Va. 443; Kerr v. Hill, 27 W. Va. 576; Matheney v. Sandford, 26 W. Va. 386; Gilchrist v. Beswick, 33 W. Va. 168; 10 S. E. Rep. 371; Vangilder v. Hoffman, 22 W. Va. 1; Ruffier v. Womack, 30 Tex. 332; Crews v. Threadgill, 35 Ala. 334; Thompson v. Banks, 2 Md. Ch. 430; Wright v. Bates, 13 Vt. 341; Edwards v. Hall, 79 Va. 321.

³ Davis v. Demming, 12 W. Va. 246, 282, per Green, J. In Streator v. Jones, 3 Hawks, 423, Hall, J., said (p. 438): "I have said that the evidence in this case convinces me that the deed in question should be considered as a mortgage, because I think it was understood by the parties that the land was redeemable; and I have come to this conclusion from the evidence given in the case. Although the evidence proving directly the declaration of Jones is not much to be relied upon, yet it is corroborative of other evidence as to the value of the land, the possession kept afterward by Streator, and the rent charged, etc., as well as the needy situation of Streator." In the same case Henderson, J., said, on page 445: "The resales, particularly when made immediately after the execution of the title deeds, should be strictly scrutinized. . . . The object of the bargain was not to acquire the property, but to make a profit of money; not that a person may not use his money to his profit and its increase, by buying and selling, but it must be a real sale and transfer of right, which from their very nature is not to be presumed. For why should a person really and *bona fide* purchase the property, and in a moment after, without any cause and before that foible of our nature, proneness to change, could exert its influence, part with it again? It is said the motive was to make money. It is admitted and was so understood before the contract was closed, and formed part of it; and it is true that there may be, upon principle, a sale made under such circumstances, but I have never known one, and they are so rare that I have never known a person who had."

on its face was made to him, executed and delivered to the grantor an agreement for reconveyance on payment of a given sum within a limited time; the grantor remained in the possession and use of the land as before; these facts were held to show that the deed was intended only as a security for the payment of a debt.¹

§ 1132. **Payment of interest.**—If, by the contract or understanding between the parties, interest is to be paid, it is a circumstance tending to show the existence of a debt, and that the transaction is a mortgage and not a conditional sale.² It may happen that what is really the payment of interest may be made to assume the appearance of the payment of rent. Thus, a deed was executed, and the grantor afterward took a lease of the premises from the grantee, and the grantee covenanted to reconvey

¹ *Clark v. Finlon*, 90 Ill. 245; *Ransone v. Frayser*, 10 Leigh, 592; *Gibson v. Eller*, 13 Ind. 124; *Lincoln v. Wright*, 4 De Gex & J. 16; *Ruffier v. Womack*, 30 Tex. 332; *Campbell v. Dearborn*, 109 Mass. 130; 12 Am. Rep. 671; *Steel v. Black*, 3 Jones Eq. 427; *Daubenspeck v. Platt*, 22 Cal. 330; *Strong v. Shea*, 83 Ill. 575; *Thompson v. Banks*, 2 Md. Ch. 430; *Sellers v. Stalcup*, 7 Ired. Eq. 13; *Kemp v. Earp*, 7 Ired. Eq. 167. In *Lawrence v. Dubois*, 16 W. Va. 443, 461, the court said: "Another strong circumstance is that the vendor remains in the possession of the property long after the alleged sale and payment therefor." In *Kemp v. Earp*, 7 Ired. Eq. 167, the court said (p. 171): "The plaintiff held possession for the balance of the year 1845, during the year 1846, and until August, 1847, *without paying rent*. It is not suggested that by the terms of the sale she was entitled to remain on the land rent free. This is inconsistent with the fact of an absolute sale, and can only be accounted for on the ground of a mortgage." Where a person, who afterward died, gave an absolute deed to a creditor, but remained in possession of the land, it was held, in a contest between the other creditors and the widow of the deceased, that parol evidence might be admitted to show that the conveyance was only a mortgage: *Carter v. Hallahan*, 61 Ga. 314.

² *Montgomery v. Spect*, 55 Cal. 352; *Murphy v. Calley*, 1 Allen, 107; *Farmer v. Grose*, 42 Cal. 169; *Harbison v. Houghton*, 41 Ill. 522; *Honore v. Hutchings*, 8 Bush, 687. In *Montgomery v. Spect*, 55 Cal. 352, the court said: "But, although there was no personal obligation on the part of Spect to pay the seven thousand dollars with interest, there is one circumstance which tends to raise a presumption of loan, or indebtedness, and that is that the sum to be paid by Spect, in case he desired a reconveyance, was the precise amount expressed as the consideration in the deed, with interest at one and one-fourth per cent per month."

to the grantor on the payment of a sum of money within a time specified; it was held that although the lease and covenant gave the transaction the appearance of a conditional sale, that the relation of mortgagor and mortgagee existed.¹ A conveyance of land in fee and a bond to reconvey upon payment of the consideration, and to permit the obligee meanwhile to occupy the premises, at a rent equal to interest on that sum, constitute a mortgage.² A grantor took back a lease by which he was entitled to the possession of the land conveyed by the payment of a monthly rent, and which gave him the privilege of repurchasing at any time within the expiration of twelve months by repaying the amount received as consideration for the deed. He remained in possession for eleven years, and his payments of rents during that time amounted to more than the sum that he received; the transaction was held to be a mortgage, and the debt was held to be discharged by the payments.³

In *Murphy v. Calley*, 1 Allen, 107, a deed of land absolute in form, and an agreement under seal, executed by the grantee at the same time, covenanting to reconvey, if within a specified time the grantor should repay the sum paid for the conveyance with interest, and providing that if the grantor did not repay that sum with interest the agreement should be void and the deed absolute, with no further right of redemption, were held to constitute a mortgage. The court remarked that the agreement to reconvey on the repayment of a certain sum, with lawful interest thereon, showed that money was advanced to the grantor at the time of making the deed as part of the same transaction. It also said with reference to the objection that there was no collateral undertaking by the plaintiff to pay the money, and hence no mutuality existed, that this was by no means conclusive of the nature of the transaction; that it was only one circumstance to be considered.

¹ *Wright v. Bates*, 13 Vt. 341; *Woodward v. Pickett*, 8 Gray, 617; *Preschbaker v. Freman*, 32 Ill. 475; *Ewart v. Walling*, 42 Ill. 453. In *Wright v. Bates*, *supra*, it is said (p. 350): "Bates intended to hold a security for the money which he had loaned, and yet cut off the equity of redemption, an intention which a court of chancery will defeat. In no sense can we regard the lease in connection with the facts proved as a conditional sale. . . . The law does not permit the mortgagor to be tolled of his equity of redemption by such a shift."

² *Woodward v. Pickett*, 8 Gray, 617.

³ *Boatright v. Peck*, 33 Tex. 68, 75.

§ 1133. **Inadequacy of price.**—The fact that there is great inadequacy between the sum received by the grantee and the real value of the land will not of itself authorize a court to permit a redemption. But it is a circumstance which is entitled to weight as tending to show that the transaction was not really a sale, but in fact a mortgage.¹ Different persons may place different values upon the same piece of property, and hence inadequacy of price must be gross to be a controlling fact in determining the character of the transaction.² A lender does not usually advance an amount equal to the full value of the land, and, accordingly, the fact that the consideration paid is all that the land is worth is evidence of some weight to show that the transaction was a sale and not a mortgage.³ But the fact that the consideration expressed in the deed is somewhat greater than was actually paid by the grantee

¹ *Montgomery v. Spect*, 55 Cal. 352; *Husheon v. Husheon*, 71 Cal. 407; *Thornborough v. Baker*, 3 Swanst. 628, 631; *Bridges v. Linder*, 60 Iowa, 190; *Langton v. Horton*, 5 Beav. 9; *Wharf v. Howell*, 5 Binn. 499; *Davis v. Thomas*, 1 Russ. & M. 506; *Williams v. Owens*, 5 Mylne & C. 303; *Freeman v. Wilson*, 51 Miss. 329; *Douglass v. Culverwell*, 3 Giff. 251; *Davis v. Stonestreet*, 4 Ind. 101; *Pearson v. Seay*, 35 Ala. 612; *Wilson v. Patrick*, 34 Iowa, 362; *Trucks v. Lindsey*, 18 Iowa, 504; *Overton v. Bigelow*, 3 Yerg. 513; *Lawrence v. Du Bois*, 16 W. Va. 443; *Davis v. Demming*, 12 W. Va. 246; *Matthews v. Porter*, 16 Fla. 466, 487; *West v. Hendrix*, 28 Ala. 226; *Gibbs v. Penny*, 43 Tex. 560; *Thompson v. Banks*, 2 Md. Ch. 430; *Pierce v. Traver*, 13 Nev. 526; *Peagler v. Stabler*, 91 Ala. 308; 9 So. Rep. 157; *Vincent v. Walker*, 86 Ala. 333; 5 So. Rep. 465; *Crews v. Threadgill*, 35 Ala. 334; *Turner v. Wilkinson*, 72 Ala. 361; *Rodgers v. Moore*, 88 Ga. 88; 13 S. E. Rep. 962; *Helm v. Boyd*, 124 Ill. 370; 16 N. E. Rep. 85; *Klein v. McNamara*, 54 Miss. 90; *Gossum v. Gossum* (Ky., Mch. 24, 1891), 15 S. W. Rep. 1057; *Turpie v. Lowe*, 114 Ind. 37; 15 N. E. Rep. 834; *Helm v. Boyd*, 124 Ill. 370; 16 N. E. Rep. 85; *Walker v. Farmers' Bank*, 14 Atl. Rep. 819 (Del., June 21, 1888). See *Ferris v. Wilcox*, 51 Mich. 105; 47 Am. Rep. 551.

² *Elliott v. Maxwell*, 7 Ired. Eq. 246.

³ *Carr v. Rising*, 62 Ill. 14, 19. Inadequacy of price is not conclusive. Adequacy of price in connection with the fact that no note is given is not conclusive that the transaction is a conditional sale: *Brown v. Dewey*, 2 Barb. 28; s. c., 1 Sand. Ch. 56. Where no debt or loan is created, but only a right to repurchase exists, it is immaterial whether the sum paid for the deed or a greater sum is to be paid for a reconveyance: *Glover v. Payn*, 19 Wend. 518; *Pitts v. Cable*, 44 Ill. 103; *West v. Hendrix*, 28 Ala. 226; *French v. Sturdivant*, 8 Me. 246.

is not entitled to weight in determining whether the deed should be treated as a mortgage or not, when the instrument was made and the consideration written in it under the grantor's direction, and without the knowledge or assent of the grantee.¹

§1134. Character of transaction fixed in beginning.

Where the transaction was in the beginning a contract of mortgage, it will continue to possess this character; if it was originally a conditional sale, it will not be changed into a mortgage by lapse of time. If a conveyance is intended to be a sale with a right to repurchase, it is not made a mortgage by recording it as such.² Where it is in the beginning a sale, absolute or conditional, no event occurring afterward, except a new agreement between the parties, can turn it into a mortgage.³ Nor will the acts and declarations of a party change its character. These are nothing more than admissions, which are admissible in evidence for what they are worth.⁴ The same considerations apply to the assignment of a mortgage,⁵ or a lease,⁶ where there is an agreement to reassign within a limited time. A conveyance made upon trust may be de-

¹ *Stewart's Appeal*, 98 Pa. St. 377.

² *Morrison v. Brand*, 5 Daly, 40.

³ *Kearney v. McComb*, 16 N. J. Eq. 189; *Reed v. Reed*, 75 Me. 264; *Buse v. Page*, 32 Minn. 111; 19 N. W. Rep. 736; 20 N. W. Rep. 95; *Kleinschmidt v. Kleinschmidt*, 9 Mont. 477; 24 Pac. Rep. 266; *Finck v. Adams*, 36 N. J. Eq. 188; *Davis v. Brewster*, 59 Tex. 93; *Clark v. Henry*, 2 Cow. 324; *Gray v. Shelby*, 83 Tex. 405; 18 S. W. Rep. 809; *McCauley v. Smith*, 132 N. Y. 524; 30 N. E. Rep. 997; *Gassert v. Bogk*, 7 Mont. 585; 19 Pac. Rep. 281; *Devore v. Woodruff*, 1 N. Dak. 143; 45 N. W. Rep. 701.

⁴ See *Holmes v. Fresh*, 9 Mo. 201; *Thomaston Bank v. Stimpson*, 21 Me. 195; *Nichols v. Reynolds*, 1 R. I. 30; 36 Am. Dec. 238. But very slight circumstances may turn the scale, where the evidence is not clear whether the transaction was a sale or a mortgage: *McKinney v. Miller*, 19 Mich. 142; *Waite v. Dimick*, 10 Allen, 364; *Hickox v. Lowe*, 10 Cal. 197.

⁵ *Henry v. Davis*, 7 Johns. Ch. 40; *Pond v. Eddy*, 113 Mass. 149; *Briggs v. Rice*, 130 Mass. 50.

⁶ *Polhemus v. Trainer*, 30 Cal. 685. See *Goodman v. Grierson*, 2 Ball. & B. 274, 278; *Halo v. Schick*, 57 Pa. St. 319. See *Smith v. Cremer*, 71 Ill. 185, as to contract of purchase.

clared a mortgage rather than a trust.¹ It requires a subsequent agreement to change the character of a mortgage, taken in the beginning as such; but its character cannot be changed to the detriment of intervening interests.² A purchaser who has knowledge that the grantor claims an interest in the property takes a conveyance of it charged with the equities attached to it in the hands of the mortgagee.³

§ 1135. **Sale and resale.**—Attention has already been called to the fact that there may be a sale of property, and an agreement for a resale, without the transaction partaking of the nature of a mortgage. As an illustration of this principle, a case occurred in New York which is cited specially, because it had in it some of the incidents that might indicate that the deed should be treated as a mortgage. A held the bond of B secured by a mortgage upon a number of lots. B executed a deed to A of a number of lots, some of which were included in the mortgage, and the consideration expressed in the deed was approximately the amount due at the time on the mortgage, the deed being recorded on the day that the mortgage was satisfied of record. A agreed to give to B, by an instrument acknowledged on the day that the deed

¹ *Bromfield v. Boutall*, 24 Hun, 451. See, also, *Taylor v. Cornelius*, 60 Pa. St. 187; *Koch v. Briggs*, 14 Cal. 256; 73 Am. Dec. 651; *Vance v. Lincoln*, 38 Cal. 586; *Comstock v. Stewart*, Walk. Ch. 110; *McMenomy v. Murray*, 3 Johns. Ch. 435; *Charles v. Claggett*, 3 Md. 82; *Marvin v. Titsworth*, 10 Wis. 320; *Frick's Appeal*, 87 Pa. St. 327; *Holmes v. Matthews*, 3 Eq. Rep. 450; *Jenkin v. Row*, 5 De Gex & S. 107; *Bell v. Carter*, 17 Beav. 11; *Chambers v. Goldwin*, 5 Ves. 834; *Myers' Appeal*, 42 Pa. St. 518.

² *Elliott v. Wood*, 53 Barb. 285; *Cooper v. Whitney*, 3 Hill. 95; *Tibbs v. Morris*, 44 Barb. 138; *Bunacleugh v. Poolman*, 3 Daly, 236; *Clark v. Henry*, 2 Cowen, 324; *Parsons v. Mumford*, 3 Barb. Ch. 152; *Williams v. Thorn*, 11 Paige, 459; *Palmer v. Gurnsey*, 7 Wend. 248; *Marks v. Pell*, 1 Johns. Ch. 594.

³ *French v. Burns*, 35 Conn. 359; *Radford v. Folsom*, 58 Iowa, 473. A mortgagor may release subsequently an equity of redemption, but it must be done upon a fair consideration. His right of redemption cannot be waived by any stipulation made at the time the deed is executed: *Peugh v. Davis*, 96 U. S. 332.

was recorded, the privilege of repurchasing, if he should, before the expiration of a specified time, pay to A a sum of money corresponding in amount to the sum due upon the bond and mortgage, with interest compounded semi-annually, but no reference was made to the mortgage, or to any indebtedness, nor did B make any agreement to pay the amount specified, or to purchase the property, and the value of the property was not in excess of the consideration expressed in the deed. C subsequently, by assignment from B, succeeded to the latter's rights under the agreement, and to his interest in the property. The court held that the deed was not intended as security merely, but that it was given and received in satisfaction of the prior indebtedness, and hence that it was an absolute conveyance, with a right to repurchase.¹

§ 1136. **Parol evidence.**—At law parol evidence, showing that an absolute deed was intended as a mortgage, is, it is generally admitted, inadmissible.² The question whether a deed absolute upon its face was intended as a mortgage, is one over which courts of equity have exclusive jurisdiction.³ In England, it is held that equity will construe an absolute deed to be a mortgage, when, through fraud or accident, the defeasance has been omitted;⁴ or when there really is a separate defeasance,

¹ *Randall v. Sanders*, 87 N. Y. 578; 23 Hun, 611. And see *Adams v. Adams*, 51 Conn. 544.

² *Benton v. Jones*, 8 Conn. 186; *Bryant v. Crosby*, 36 Me. 562; 58 Am. Dec. 767; *Hogel v. Lindell*, 10 Mo. 483; *Stinchfield v. Milliken*, 71 Me. 567, 570; *Reading v. Weston*, 8 Conn. 117; 20 Am. Dec. 97; *Bragg v. Massie*, 38 Ala. 89; 79 Am. Dec. 82; *Farley v. Goocher*, 11 Iowa, 570; *Webb v. Rice*, 6 Hill, 219; *McClane v. White*, 5 Minn. 178; *Moore v. Wade*, 8 Kan. 380; *Belote v. Morrison*, 8 Minn. 87. It is admissible in Illinois, both at law and in equity; *Tillson v. Moulton*, 23 Ill. 648; *Miller v. Thomas*, 14 Ill. 428; *Coates v. Woodworth*, 13 Ill. 654. And in California such testimony is admissible at law as well as in equity: *Jackson v. Lodge*, 36 Cal. 28; *Vance v. Lincoln*, 38 Cal. 586; *Cunningham v. Hawkins*, 27 Cal. 604.

³ *Foley v. Kirk*, 33 N. J. Eq. 170; *Stinchfield v. Milliken*, 71 Me. 567.

⁴ *England v. Codrington*, 1 Eden, 169; *Lincoln v. Wright*, 4 De Gex & J. 16; *Maxwell v. Montacute*, Prec. Ch. 526.

though not reduced to writing;¹ or when, by the acts of the parties, it is apparent that the conveyance was intended as a mortgage.² This evidence was admitted in the earliest cases upon the sole grounds of fraud, accident, or mistake, and this is now the ground upon which the jurisdiction in some States is placed. But the general rule now prevailing in this country is, that parol evidence is admissible to show a deed to be in fact a mortgage, aside from any question of fraud or mistake.³ As the grounds upon which courts of equity receive parol evidence are wholly equitable, the plaintiff must have equitable grounds to entitle him to relief.

§ 1137. **Declarations of party as evidence.**—In a suit brought for the purpose of determining whether a deed absolute in form was intended as a mortgage, the declarations made after the execution of the deed by a party to the deed and to the suit, may be received in evidence as against himself.⁵ Where, at the time of the execution of a deed absolute on its face, the grantor was informed that it conveyed away all his property, evidence vague and uncertain as to admissions of the grantee, that the grantor had a right to redeem, and the fact that the grantor retained possession of the land for some time after the deed was executed, and that the price paid was somewhat less than what the property was really worth, do not make

¹ *Manlove v. Bale*, 2 Vern. 84; *Whitfield v. Parfitt*, 15 Jur. 852.

² *Cripps v. Jee*, 4 Bro. C. C. 472; *Allenby v. Dalton*, 5 Law J. K. B. 312.

³ *Russell v. Southard*, 12 How. 139; *Peugh v. Davis*, 96 U. S. 332; *Hughes v. Edwards*, 9 Wheat. 489; *Gay v. Hamilton*, 33 Cal. 686; *Campbell v. Dearborn*, 109 Mass. 130; 12 Am. Rep. 671; *Huoncker v. Merkey*, 102 Pa. St. 462; *Newton v. Fay*, 10 Allen, 505; *Hartley's Appeal*, 103 Pa. St. 23; *King v. Warrington*, 2 N. M. Ty. 318; *Vance v. Lincoln*, 38 Cal. 586; *McDonough v. Squire*, 111 Mass. 217; *Raynor v. Lyons*, 37 Cal. 452. Such evidence is introduced to show the real intention of the parties. Mr. Jones in his treatise on Mortgages, reviews the cases in the different States at length, pointing out the particular grounds upon which in each State the jurisdiction is founded: Vol. I, §§ 285-321.

⁴ *Hassam v. Barrett*, 115 Mass. 256; *Arnold v. Mattison*, 3 Rich. Eq. 153. See *Baldwin v. Cawthorne*, 19 Ves. 166.

⁵ *Ross v. Brusie*, 64 Cal. 245.

the deed a mortgage.¹ The conduct of the parties subsequently to as well as at the time of the transaction may be shown, although the evidence to establish that the deed was intended as a mortgage must be clear and convincing.²

§ 1138. **Effect of delay in seeking relief.**—Where such facts exist as make the transaction a mortgage, the mortgagor has the same time to discharge his debt as he would have if he had executed a mortgage instead of a deed; hence delay in claiming the deed to be a mortgage has not the effect given to it when the enforcement of executory contracts is sought in equity.³ Some weight may be given to delay as bearing upon the question of whether the instrument was intended as a mortgage or not. But the tardiness of the grantor may be explained, and no lapse of time unless the action is barred by the statute of limitations, will be sufficient to exclude the introduction of parol evidence to show that the conveyance was intended as a mortgage.⁴ But where there is other evidence to show that there was a sale, lapse of time is a circumstance to be considered.⁵ A grantor is estopped to claim that a deed was a mortgage, where the grantee takes possession, and with the knowledge of the grantor sells the property.⁶

¹ *Edwards v. Wall*, 79 Va. 321.

² *Bartling v. Brasuhn*, 102 Ill. 441.

³ *Odenbaugh v. Bradford*, 67 Pa. St. 96.

⁴ *Anding v. Davis*, 38 Miss. 574; 77 Am. Dec. 658.

⁵ *Full v. Owen*, 4 Younge & C. 192. It was held in a case where the bill to redeem was not filed until thirteen years after the execution of the deed, and more than seven years after the grantee had refused to recognize the claim of the grantor for an equity of redemption, and no sufficient excuse for the delay was given, that the laches was such as to bar any claim to relief: *Maher v. Farwell*, 97 Ill. 56; *De France v. De France*, 34 Pa. St. 385; *Conner v. Chase*, 15 Vt. 764.

⁶ *Woodworth v. Carman*, 43 Iowa, 504. A mortgagor abandoning his right to redeem from an absolute conveyance, is bound by his election: *Maxfield v. Patchen*, 29 Ill. 39, 42; *Carpenter v. Carpenter*, 70 Ill. 457. If a party claiming that a deed is a mortgage obtains a decree entitling him to a reconveyance on the payment of a specified sum, and fails to pay said sum, although the conveyance is executed and tendered, the court can order, on a petition in the nature of a supplementary bill to enforce the decree, that the amount of rent in the hands of the lessee of

§ 1139. **Judgment creditor may show that debtor's deed is a mortgage.**—Where a creditor has obtained a judgment, and, at a sale under execution issued upon it, has purchased his debtor's land, he is permitted to show that a deed made by his debtor was really a mortgage. He is subrogated to the rights of the debtor, and is entitled to a reconveyance upon paying the sum due upon the mortgage.¹ And, without being an execution purchaser, he may show that the deed is really a mortgage.² A grantee's creditor, however, when a deed is in fact a mortgage, can obtain only a defeasible title by a sale on execution. He does not take a better title than that held by the judgment debtor.³

§ 1140. **Sheriff's deed.**—A deed made by a sheriff and absolute on its face may be shown by parol evidence to have been intended as security for the payment of money. The rule is as applicable to deeds of this kind as to deeds between private parties.⁴ Thus, in the case cited, the bidder at a sheriff's sale borrowed money from another with which to pay the bid, and it was then agreed that, as security for the loan, the deeds of the sheriff should be made directly to the person advancing the money until it was repaid. The grantee in the sheriff's deeds subsequently claimed the legal title in his own interest, and the bidder at the sale, having tendered to the grantee the full amount of the loan and interest, obtained a decree declaring the deeds executed by the sheriff to be mortgages, and ordering the legal title to be conveyed upon payment of the money secured.⁵

the property be paid to the grantee, to be applied on the original decree: *Winston's Appeal*, 97 Pa. St. 385.

¹ *Clark v. Condit*, 18 N. J. Eq. 358; *Judge v. Reese*, 24 N. J. Eq. 387; *Van Buren v. Olmstead*, 5 Paige, 9. See *Gulley v. Macy*, 84 N. C. 434.

² *Allen v. Kemp*, 29 Iowa, 452; *De Wolf v. Strader*, 26 Ill. 225; 79 Am. Dec. 371; *Dwen v. Blake*, 44 Ill. 135. A judgment becomes a lien upon the equity of redemption: *Christie v. Hale*, 46 Ill. 117.

³ *Leech v. Hillsman*, 8 Lea, 747.

⁴ *Logue's Appeal*, 104 Pa. St. 136.

⁵ *Logue's Appeal*, 104 Pa. St. 136. And see *Beatty v. Brummett*, 94 Ind. 75; *Hoile v. Bailey*, 58 Wis. 434.

§ 1141. **Absolute owner as to third parties.**—As to third persons, the grantee of the legal title is considered the legal owner.¹ Therefore, if an absolute conveyance is made as security for a loan, a purchaser from the grantee, without notice of the deed being intended as a mortgage, obtains a title to which the equity of the grantor does not attach.² But a purchaser who has notice acquires a defeasible title;³ and when no valuable consideration has been paid, the purchaser's position is no better than that of his grantor.⁴ Where a purchaser has knowledge or notice of the true state of the title, his deed is only an assignment of the grantee's interest in the property.⁵ If a grantee, under an absolute deed, agrees to reconvey on the performance by the grantor of certain conditions within a specified time, and if after the expiration of such time, the grantee conveys to another who had no actual knowledge of such agreement, and who makes costly improvements, the grantor in the first deed knowing of this sale, but not disclosing his interest, and inducing, by his statements and conduct, the purchaser to believe that he was purchasing an unincumbered title, the first grantor, although the relation existing between him and his grantee may have been that of mortgagor and mortgagee, cannot secure the aid of a court of equity to enable him to redeem.⁶

¹ *Digby v. Jones*, 67 Mo. 104; *Fiedler v. Darrin*, 59 Barb. 651; *McCarthy v. McCarthy*, 36 Conn. 177; *Jenkins v. Rosenberg*, 105 Ill. 157; *Pico v. Gallardo*, 52 Cal. 206; *Thaxton v. Roberts*, 66 Ga. 704; *Groton Savings Bank v. Batty*, 30 N. J. Eq. 126.

² *Pico v. Gallardo*, 52 Cal. 206; *Frink v. Adams*, 36 N. J. Eq. 485.

³ *Houser v. Lamont*, 55 Pa. St. 311; 93 Am. Dec. 755; *Radford v. Folsom*, 58 Iowa, 473; *Graham v. Graham*, 55 Ind. 23; *Amory v. Lawrence*, 3 Cliff. 523; *Smith v. Knoebel*, 82 Ill. 392; *Kuhn v. Rumpp*, 46 Cal. 299; *Lawence v. Du Bois*, 16 W. Va. 443.

⁴ *Zane v. Fink*, 18 W. Va. 693; *Lawrence v. Du Bois*, 16 W. Va. 443. See, also, *Abbott v. Hanson*, 24 N. J. L. (4 Zab.) 493; *Williams v. Thorn*, 11 Paige, 459. A grantee seeking to redeem must pay the amount due: *White v. Lucas*, 46 Iowa, 319; *Cowing v. Rogers*, 34 Cal. 648; *Heacock v. Swartwout*, 28 Ill. 291; *Westfall v. Westfall*, 16 Hun. 541.

⁵ *Radford v. Folsom*, 58 Iowa, 473.

⁶ *Tufts v. Tapley*, 129 Mass. 380.

§ 1142. **Notice in bankruptcy proceedings.**—A person who has proved a claim against the estate of a bankrupt, cannot be charged with notice that a deed executed by the bankrupt was intended only as a mortgage, from the fact that the property embraced in the deed was placed in the schedule of assets, for the person so proving his claim was afterward as much a stranger to the schedule as if his claim had never been proved at all.¹ Nor would the presence of the assignee and his attorney at a meeting of the bankrupt's creditors to provide for leasing the property pending litigation concerning them, no agreement for leasing having been executed, and the assignee making no declaration of any interest in the bankrupt, be sufficient to place a subsequent purchaser from the grantee of the bankrupt upon inquiry so as to charge him with notice of the nature of the deed.²

§ 1143. **Payment of debt.**—A purchaser is not affected by any secret trust or equity of which he had no notice. The payment of the whole amount due from the mortgagor, in a case where the mortgage is in the form of an absolute deed, can have no effect upon the title of a person claiming under the mortgagee, who possesses no notice of the fact that the deed is in reality a mortgage.³

§ 1144. **Parol evidence to show a mortgage a conditional sale.**—As we have seen, parol evidence is admissible in equity to show that a deed with or without an agreement to reconvey is a mortgage. But if the instrument shows upon its face that it is a mortgage, parol evidence is not received to show that the parties intended to make a conditional sale; the court must construe the instrument without a resort to oral evidence.⁴ The proof,

¹ *Jenkins v. Rosenberg*, 105 Ill. 157.

² *Jenkins v. Rosenberg*, 105 Ill. 157. An attaching creditor cannot claim an estoppel in bankruptcy proceedings, because an agreement for defeasance has not been recorded: *Moors v. Albro*, 129 Mass. 9.

³ *Sweetzer v. Atterbury*, 100 Pa. St. 18.

⁴ *Alstin v. Cundiff*, 52 Tex. 453.

if admitted, would contradict the writing; it is received for the purpose of showing an absolute deed to be a mortgage, to raise an equity consistent with and superior to the written conveyance.¹

§ 1145. **Proof of other conditions.**—When it is shown by parol testimony that a deed absolute on its face was not intended to operate as such, but as a mortgage, all the conditions of the instrument or transaction may be proved in a similar manner.² Between the parties, it may be shown by parol testimony that the mortgage was afterward extended so as to cover new debts.³

§ 1146. **Time for redemption.**—On general principles the right to redeem and the right to foreclose are reciprocal. In a case in California, it was decided that when the right to foreclose is barred by the statute of limitations, the right to redeem is also barred.⁴ But the court evidently overlooked a provision of the code applicable to this very question. The code provides that “an action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage.”⁵ The right to foreclose is barred in four years. But by this section the right to redeem is limited to five years. This section was not referred to in the opinion of the court, and manifestly escaped its attention.

§ 1147. **Presumption in doubtful cases.**—Where a person seeks to have an absolute deed declared a mort-

¹ *Kunkle v. Wolfersberger*, 6 Watts, 126; *McClintock v. McClintock*, 3 Brewst. 76; *Reitenbaugh v. Ludwick*, 31 Pa. St. 131, 138; *Woods v. Wallace*, 22 Pa. St. 171; *Wharf v. Howell*, 5 Binn. 499.

² *Walker v. Walker*, 17 S. C. 329.

³ *Walker v. Walker*, 17 S. C. 329.

⁴ *Taylor v. McClain*, 60 Cal. 651; 61 Cal. 513.

⁵ Code Civ. Proc. Cal. § 346.

gage, he should make strict proof of the fact.¹ It is said, however, in many well considered cases, that when it is doubtful whether a transaction is a mortgage or a conditional sale, it will be treated as a mortgage, and the doubts solved in favor of allowing the grantor to redeem.² "If, however, any given transaction should turn out, upon investigation, to be a conditional sale, and it should be satisfactorily established to be a real sale, and not a thin disguise whereby a loan is concealed, as a matter of course, such transaction will be held valid in accordance with the intention of the parties. But courts of equity watch transactions of this sort with such zealous and ever vigilant solicitude, that if the matter be in doubt, they will resolve that doubt in favor of the theory of a mortgage, and compel the transaction to assume and wear that

¹ *Magnusson v. Johnson*, 73 Ill. 156; *Taintor v. Keys*, 43 Ill. 332; *Sharp v. Smitherman*, 85 Ill. 153; *Edwards v. Wall*, 79 Va. 321; *Knowles v. Knowles*, 86 Ill. 1; *Smith v. Cremer*, 71 Ill. 185; *Knight v. McCord*, 63 Iowa, 429; *Price v. Karnes*, 59 Ill. 276; *Dwen v. Blake*, 44 Ill. 135. See, also, *Williams v. Stratton*, 18 Miss. (10 Smedes & M.) 418; *Maher v. Farwell*, 97 Ill. 56; *Howland v. Blake*, 97 U. S. 624; *Coburn v. Anderson*, 62 How. Pr. 268; *Hancock v. Harper*, 86 Ill. 445; *Jones v. Brittain*, 1 Woods, 667; *Bingham v. Thompson*, 4 Nev. 224; *Hopper v. Jones*, 29 Cal. 18; *Conwell v. Evill*, 4 Blackf. 67; *Pierce v. Traver*, 13 Nev. 526; *Johnson v. Van Velsor*, 43 Mich. 208; *Arnold v. Mattison*, 3 Rich. Eq. 153; *Williams v. Cheatham*, 19 Ark. 278; *Butler v. Butler*, 46 Wis. 430; *Henley v. Hotaling*, 41 Cal. 22; *Moore v. Ivey*, 8 Ired. Eq. 192; *Tilden v. Streeter*, 45 Mich. 533.

² *Trucks v. Lindsey*, 18 Iowa, 504; *Heath v. Williams*, 30 Ind. 495; *Klein v. McNamara*, 54 Miss. 90; *De Bruhl v. Maas*, 54 Tex. 464; *Russell v. Southard*, 12 How. 139; *Pioneer Gold Min. Co. v. Baker*, 10 Saw. 539; 23 Fed. Rep. 258; *Artz v. Grove*, 21 Md. 456; *Hickox v. Lowe*, 10 Cal. 196; *Free v. Cobine*, 11 Eq. Rep. 406; *Peugh v. Davis*, 96 U. S. 336; *Conway v. Alexander*, 6 Cranch, 236; *O'Neill v. Cappelle*, 62 Mo. 202; *Brandt v. Robertson*, 16 Mo. 129; *Turner v. Kerr*, 44 Mo. 429; *Desloge v. Ranger*, 7 Mo. 327; *Heath v. Williams*, 38 Ind. 495; *Bacon v. Brown*, 19 Conn. 34; *Baughner v. Merryman*, 32 Md. 185; *King v. Newmann*, 2 Munf. 40; *Robertson v. Campbell*, 2 Call, 421; *Davis v. Demming*, 12 W. Va. 246; *Secrest v. Turner*, 2 Marsh. J. J. 471; *Skinner v. Muller*, 5 Litt. 84; *Bright v. Wagle*, 3 Dana, 252; *Matthews v. Sheehan*, 69 N. Y. 585; *Poindexter v. McCannon*, 1 Dev. Eq. 377; 18 Am. Dec. 591; *McDonald v. McLeod*, 1 Ired. Eq. 221; *Page v. Foster*, 7 N. H. 392; *Crane v. Bonnell*, 1 Green Ch. 264; *Holton v. Meighen*, 15 Minn. 69; *Cornell v. Hall*, 22 Mich. 377. See *De Laigle v. Denham*, 65 Ga. 482.

hue and complexion.”¹ The reason given for this rule is “because in the case of a mortgage, the mortgagor, although he has not strictly complied with the terms of the mortgage, still has his right of redemption; while in the case of a conditional sale, without strict compliance, the rights of the conditional purchaser are forfeited.”²

§ 1147 a. **Trend of authority.**—While there has been a wide divergence of opinion as to whether, in a doubtful case, the court should presume that the deed was intended to be absolute or a mortgage, yet the trend of authority is to the effect that the party claiming that a deed was intended as a mortgage should establish that fact by clear and convincing evidence, and slight or indefinite evidence will not be permitted to change the character of the instrument from what it appears on its face to be, into a mortgage. It may be said to be the law, that the evidence to show that a deed was intended as a mortgage should be satisfactory, and sufficient to overcome the strong presumption created by the language of the deed—that it is what it purports to be, an absolute conveyance—and where the evidence is doubtful and unsatisfactory, the deed must be held to be absolute.³

¹ O'Neill v. Cappelle, 62 Mo. 202, 207.

² Matthews v. Sheehan, 69 N. Y. 590. “In cases of doubt, however, a court of equity always leans in favor of a mortgage rather than a conditional sale”: Davis v. Demming, 12 W. Va. 246. “The leaning of courts has always been against considering a conveyance a conditional sale; and where there has been any doubt, it has been viewed as a mortgage,” said the court in Page v. Foster, 7 N. H. 392, 394.

³ Townsend v. Petersen, 12 Colo. 491; Whitsett v. Kershow, 4 Colo. 419; Armor v. Spalding, 14 Colo. 302; Perot v. Cooper, 17 Colo. 80; 31 Am. St. Rep. 258; Bingham v. Thompson, 4 Nev. 224; Pierce v. Traver, 13 Nev. 526; Henley v. Hotaling, 41 Cal. 22; Mahoney v. Bostwick, 96 Cal. 53; 31 Am. St. Rep. 175; Langer v. Merservey, 80 Iowa, 159; Conwell v. Evill, 4 Blackf. 67; Albany etc. Canal Co. v. Crawford, 11 Or. 243; Ensminger v. Ensminger, 75 Iowa, 89; 9 Am. St. Rep. 462; Allen v. Fogg, 66 Iowa, 229; Matthews v. Porter, 16 Fla. 466; Williams v. Cheatham, 19 Ark. 278; Arnold v. Mattison, 3 Rich. Eq. 153; Knapp v. Bailey, 79 Me. 195; 1 Am. St. Rep. 295; Hyatt v. Cochran, 37 Iowa, 309; Wright v. Mahaffey, 76 Iowa, 96; Pancake v. Cauffman, 114 Pa. St. 113; Moore v. Ivey, 8 Ired. Eq. 192; Case v. Peters, 20 Mich. 298; Tilden v. Streeter,

45 Mich. 533; *Johnson v. Van Velsor*, 43 Mich. 208; *Kibby v. Harsh*, 61 Iowa, 196; *Corbit v. Smith*, 37 Iowa, 309; *Knight v. McCord*, 63 Iowa, 429; *Shays v. Norton*, 48 Ill. 100; *Magnusson v. Johnson*, 73 Ill. 156; *Helm v. Boyd*, 124 Ill. 370; *Maher v. Farwell*, 97 Ill. 56; *Price v. Karnes*, 59 Ill. 276; *Parmelee v. Lawrence*, 44 Ill. 405; *Hancock v. Harper*, 86 Ill. 445; *Strong v. Strong*, 126 Ill. 301; 27 Ill. App. 148; *Bartling v. Brashun*, 102 Ill. 441; *Knowles v. Knowles*, 86 Ill. 1; *Workman v. Greening*, 145 Ill. 447; *Bailey v. Bailey*, 115 Ill. 551; *Faringer v. Ramsey*, 2 Md. 365; *Lance's Appeal*, 112 Pa. St. 456; *Nicolls v. McDonald*, 101 Pa. St. 514; *Cadman v. Peter*, 118 U. S. 73; *Satterfield v. Malone*, 35 Fed. Rep. 445; *Williams v. Stratton*, 18 Miss. 418; *Adams v. Adams*, 51 Conn. 544; *Downing v. Woodstock Iron Co.*, 93 Ala. 262; *Peagler v. Stabler*, 91 Ala. 308; *Howland v. Blake*, 97 U. S. 624; *Edwanes v. Wall*, 79 Va. 321; *Sable v. Maloney*, 48 Wis. 331; *Schriber v. Le Clair*, 66 Wis. 579; *Rockwell v. Humphrey*, 57 Wis. 410; *Hunter v. Maanum*, 78 Wis. 656; *Kerr v. Hill*, 27 W. Va. 576; *Hinton v. Pritchard*, 107 N. C. 128; *Leggett v. Leggett*, 88 N. C. 108; *McNair v. Pope*, 100 N. C. 404; *Smiley v. Pearce*, 98 N. C. 185; *Mitchell v. Wellman*, 80 Ala. 16; *Knaus v. Dreher*, 84 Ala. 319; *Turner v. Wilkinson*, 72 Ala. 361; *Parks v. Parks*, 66 Ala. 326; *Hartley's Appeal*, 103 Pa. St. 23; *Stewart's Appeal*, 98 Pa. St. 377; *Logue's Appeal*, 104 Pa. St. 306; 49 Am. Rep. 508; *Haines v. Thompson*, 70 Pa. St. 434; *Erwin v. Curtis*, 43 Hun, 292; *Shattuck v. Bascom*, 55 Hun, 14; *Holmes v. Grant*, 8 Paige, 243; *McClellan v. Sanford*, 26 Wis. 595; *Newton v. Holley*, 6 Wis. 592; *McCormick v. Herndon*, 67 Wis. 648; *Kent v. Lasley*, 24 Wis. 654; *Butler v. Butler*, 46 Wis. 430; *Marks v. Pell*, 1 Johns. Ch. 594; *Coyle v. Davis*, 116 U. S. 108; *Cobb v. Day*, 106 Mo. 278; *Wilson v. Parshall*, 129 N. Y. 223.

CHAPTER XXXII.

DEED TO ONE, PURCHASE MONEY PAID BY ANOTHER.

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§ 1148. In general.—Where one pays the purchase money, but the title is taken in the name of another, the party taking the legal title will, under certain circumstances, be declared a trustee of the one whose money paid for the land. A trust of this kind is known as a resulting trust. Each case must in a measure be determined by its own circumstances. In some cases the deed will convey to the grantee a beneficial interest, as when it is made to a wife or child, who, nevertheless, has paid no part of the purchase money.¹

§ 1149. Legislation as to resulting trusts.—The rule as to resulting trusts, where the purchase money has been paid by one and the deed taken by another, has been modified or abolished in several of the States. In New York the title vests in the grantee, where it has been so taken with the consent or knowledge of the person paying the consideration, and where the grantee has not purchased the land in violation of a trust. But the conveyance is deemed fraudulent as against the creditors who were such at that time, of the person paying the consideration, and the grantee has the burden of proof of show-

¹ *Robinson v. Taylor*, 2 Bro. Ch. 594; *Elliott v. Elliott*, 2 Ch. Cas. Ch. 232; *Coningham v. Mellish*, Prec. Ch. 31; *Hayes v. Kingdome*, 1 Vern. 33; *Christ's Hospital v. Budgin*, 2 Vern. 683; *Lloyd v. Spillett*, 2 Atk. 566; *Jennings v. Selleck*, 1 Vern. 467; *Baylis v. Newton*, 2 Vern. 28; *Smith v. King*, 16 East, 283; *Grey v. Grey*, 2 Swanst. 598; *Cook v. Hutchinson*, 1 Keen, 42; *Rogers v. Rogers*, 3 P. Wms. 193; *Cripps v. Jee*, 4 Bro. C. C. 472. It is not necessary for the creation of a resulting trust that one party should have been guilty of fraud: *Talbott v. Barber*, 11 Ind. App. 1; 38 N. E. Rep. 487.

ing that the transaction was not for a fraudulent purpose.¹ Statutes of a similar import have been passed in Indiana,² Minnesota,³ Michigan,⁴ Kansas,⁵ Wisconsin,⁶ Kentucky.⁷ But these provisions of the statute imply that the party paying the purchase money had full knowledge that the deed was made to another.⁸ And it has been held under these statutes, where the purchase was made by the parties paying the money for the benefit of, and intended as a gift or advancement to, their daughter, who was an infant, and an absolute deed was executed to a third person for the benefit of such infant daughter, but without her consent or knowledge, that these statutes did not apply, and that the holder of the legal title had a mere naked title without interest, against which a judgment rendered against him could not become a lien.⁹

¹ Rev. Stats., pt. 2, ch. 1, art. 6, §§ 51-53, vol. 2, p. 1105 (ed. 1875). See *Jencks v. Alexander*, 11 Paige, 619; *Bodine v. Edwards*, 10 Paige, 504; *Siemon v. Schurck*, 29 N. Y. 598; *Brewster v. Power*, 10 Paige, 562; *Lounsbury v. Purdy*, 16 Barb. 376; 18 N. Y. 515; *Gilbert v. Gilbert*, 1 Keyes, 159; *Willink v. Vanderveer*, 1 Barb. 599; *Norton v. Stone*, 8 Paige, 222; *Reid v. Fitch*, 11 Barb. 399; *Watson v. Le Row*, 6 Barb. 481; *Swinburne v. Swinburne*, 28 N. Y. 568; *Buffalo R. R. Co. v. Lampson*, 47 Barb. 533; *Stover v. Flack*, 41 Barb. 162; *Foote v. Bryant*, 47 N. Y. 544; *Reitz v. Reitz*, 80 N. Y. 538; *Day v. Roth*, 18 N. Y. 448; *Underwood v. Sutcliffe*, 77 N. Y. 58; *Traphagen v. Burt*, 67 N. Y. 30; *Ocean Nat. Bank v. Olcott*, 46 N. Y. 12; *McCartney v. Bostwick*, 32 N. Y. 53; *Jackson v. Forrest*, 2 Barb. Ch. 576; *Sieman v. Austin*, 33 Barb. 9.

² Stats. 1876, vol. 1, p. 915, §§ 6-8.

³ Stats. (Younge's ed. 1830), p. 553, §§ 7-9. See *Durfee v. Pavitt*, 14 Minn. 424.

⁴ Comp. Laws 1871, vol. 2, p. 1331, § 7. See *Fisher v. Fobes*, 22 Mich. 454; *Groesbeck v. Seeley*, 13 Mich. 329.

⁵ Comp. Laws (Dassler's ed., 1881), p. 989, § 6.

⁶ Rev. Stats. (Taylor's ed., 1872), vol. 2, p. 1129, § 7.

⁷ Gen. Stats. 1873, p. 587, § 19. See *Martin v. Martin*, 5 Bush, 47. And see, as to other States, *McDonough's Executors v. Murdock*, 15 How. 367; *Gaines v. Chew*, 2 How. 619; *Hutchins v. Haywood*, 50 N. H. 491; *Clark v. Chamberlain*, 13 Allen, 257.

⁸ *Reitz v. Reitz*, 80 N. Y. 538.

⁹ *Siemon v. Schurck*, 29 N. Y. 508. "It is fairly inferable," said Hogeboom, J., "from the phraseology of these sections, and it is obvious from the notes of the revisers, that the principal, if not the only mischief intended to be remedied and uprooted by these sections, was a secret trust for the benefit of the person paying the consideration. It was not deemed

§ 1150. **Deed to one, and purchase money paid by another.**—The law presumes, in the absence of a statutory declaration to the contrary, that the one who pays the consideration is the one to reap the benefit, and that if, from any cause or reason operating between themselves, the title is not taken in the name of the one who has paid the purchase price, this was done for some reason satisfactory to themselves, yet not for the purpose of vesting the whole title in the apparent grantee. Hence, it may be asserted that, as a general proposition, where the purchase money is paid by one and the title taken in the name of another, the two being strangers to each other, a resulting trust arises, and the grantee will be held to be a trustee for the person who parted with the consideration for which the deed was made.¹ “It is a settled principle

consistent with fair dealing and just policy that a person for whose use such a conveyance was made, and who was designed to reap all the benefits thereof, should thus conceal a real ownership under an assumed name; and the statute, therefore, virtually imposed upon him the penalty of the forfeiture of his estate. No such argument—at least, not in all its force—applies to the case of a gift or advancement made by a parent to a child, where the latter was intended to be vested with the beneficial ownership and the complete equitable title. It may be difficult to give a satisfactory reason why the title should not have been conveyed directly to the child for whose benefit the conveyance was intended; but whether the real motive was to conceal the character of the transaction from the other children, or equally deserving claimants upon the bounty of the parent, or from a supposed inconvenience or embarrassment in making the conveyance to a minor, or from ignorance or injudicious advice, or any other cause, we are able to see that the mischiefs of such a transaction are by no means as great as those arising from a secret trust in favor of the person paying the consideration himself.”

¹ *Union College v. Wheeler*, 59 Barb. 585; *Boyd v. McLean*, 1 Johns. Ch. 582; *Neale v. Hagthorp*, 3 Bland, 551; *Hempstead v. Hempstead*, 2 Wend. 109; *Willis v. Willis*, 2 Atk. 71; *Woodman v. Morrel*, 2 Freem. 33; *Wallace v. Duffield*, 2 Serg. & R. 521; 7 Am. Dec. 660; *Dillard v. Crocker*, Speer Eq. 20; *Edwards v. Edwards*, 39 Pa. St. 369; *Bostleman v. Bostleman*, 24 N. J. Eq. 103; *Long v. Steiger*, 8 Tex. 460; *Groesbeck v. Seeley*, 13 Mich. 329; *Campbell v. Campbell*, 21 Mich. 438; *Glidewell v. Spaugh*, 36 Ind. 319; *Garrett v. Garrett*, 1 Strob. Eq. 96; *Davis v. Baugh*, 59 Cal. 568; *Johnson v. Quarles*, 46 Mo. 423; *Rankin v. Harper*, 23 Mo. 579; *Paul v. Chouteau*, 14 Mo. 580; *Russell v. Lode*, 1 Greene, 566; *Williams v. Hollingsworth*, 1 Strob. Eq. 103; 47 Am. Dec. 527; *McGov-*

that where one person purchases property for a stranger, and the purchase money is paid by the stranger, or out of his funds, although the title is taken in the name of the person making the purchase, a trust results, and the

ern v. Knox, 21 Ohio St. 551; 8 Am. Rep. 80; Bayles v. Baxter, 22 Cal. 575; Millard v. Hathaway, 27 Cal. 119; Wilson v. Castro, 31 Cal. 420; Jenkins v. Frink, 30 Cal. 586; 89 Am. Dec. 134; Case v. Coddington, 38 Cal. 191; Settembre v. Putnam, 30 Cal. 490; Trench v. Harrison, 17 Sim. 111; Murless v. Franklin, 1 Swanst. 17; Grey v. Grey, 2 Swanst. 597; Rider v. Kidder, 10 Ves. 360; Ex parte Vernon, 2 P. Wms. 549; Lade v. Lade, 1 Wils. 21; Hungate v. Hungate, Toth. 120; Redington v. Redington, 3 Ridg. App. 177; Finch v. Finch, 15 Ves. 50; Ex parte Houghton, 17 Ves. 253; Crop v. Norton, 9 Mod. 235; Ambrose v. Ambrose, 1 P. Wms. 321; Henderson v. Hoke, 1 Dev. & B. Eq. 119; Strimpfler v. Roberts, 18 Pa. St. 283; 57 Am. Dec. 606; Lloyd v. Carter, 17 Pa. St. (5 Harris) 216; Beck v. Graybill, 28 Pa. St. (4 Casey) 66; Lynch v. Cox, 23 Pa. St. (11 Harris) 265; Kiser v. Kiser, 2 Watts, 323; 27 Am. Dec. 308; Cutler v. Tuttle, 19 N. J. Eq. 549, 558; Hollis v. Hollis, 1 Md. Ch. 479; Guthrie v. Gardner, 19 Wend. 414; Wasley v. Foreman, 38 Cal. 90; Perry v. Head, 1 Marsh. A. K. 46; Gass v. Gass, 1 Heisk. 613; Elliott v. Armstrong, 2 Blackf. 198; Phillips v. Crammond, 2 Wash. C. C. 441; Kirkpatrick v. Davidson, 2 Kelly, 297; Hall v. Sprigg, 7 Mart. (La.) 243; 12 Am. Dec. 506; Nichols v. Thornton, 16 Ill. 113; Prevo v. Wallers, 4 Scam. 35; McDonough's Executors v. Murdock, 15 How. 367; Church v. Cole, 36 Ind. 35; Hampson v. Fall, 64 Ind. 382; Letcher v. Letcher, 4 Marsh. J. J. 592; Baumgartner v. Guessfeld, 38 Mo. 36; McLennan v. Sullivan, 13 Iowa, 521; Tinsley v. Tinsley, 52 Iowa, 14; Rogan v. Walker, 1 Wis. 527; Seaman v. Cook, 14 Ill. 501; Rhodes v. Green, 36 Ind. 11; Stark v. Cannady, 3 Litt. 399; 14 Am. Dec. 76; Harris v. Union Bank, 1 Cold. 152; Irvine v. Marshall, 7 Minn. 286; Groves v. Groves, 3 Younge & J. 170; Wray v. Steele, 2 Ves. & B. 390; Pelly v. Maddin, 21 Vin. Abr. 498; Smith v. Baker, 1 Atk. 385; Withers v. Withers, Amb. 151; Lever v. Andrews, 7 Brown Parl. C. 288; Clarke v. Danvers, 1 Ch. Cas. Ch. 310; Smith v. Camelford, 3 Ves. J. R. 712; Pranker v. Pranker, 1 Sim. & S. 1; Goodright v. Goodright, 1 Watk. Cop. 227; Lofft, 230; Jackman v. Ringland, 4 Watts & S. 149; Bank of United States v. Carrington, 7 Leigh, 566; Tebbetts v. Tilton, 31 N. H. 283; Hall v. Young, 37 N. H. 134; Lyford v. Thurston, 16 N. H. 399; Page v. Page, 8 N. H. 187; Dow v. Jewell, 18 N. H. 340; 45 Am. Dec. 371; Hopkinson v. Dumas, 42 N. H. 296; Hall v. Congdon, 56 N. H. 279; Brown v. Cherry, 59 Barb. 628; Howell v. Howell, 15 N. J. Eq. 75; Johnson v. Dougherty, 18 N. J. Eq. 406; Depyster v. Gould, 2 Green Ch. 480; 29 Am. Dec. 723; Botsford v. Burr, 2 Johns. Ch. 408; Jackson v. Sternberg, 1 Johns. Cas. 523; Kelley v. Jenness, 50 Me. 455; 79 Am. Dec. 623; Baker v. Vining, 30 Me. 126; 50 Am. Dec. 617; Buck v. Pike, 11 Me. 9; Cecil Bank v. Snively, 23 Md. 253; Newells v. Morgan, 2 Harris, 225; Dorsey v. Clarke, 4 Har. & J. 551; Chapline v. McAfee, 3 Marsh. J. J. 513; McGuire v. Ramsey, 4 Eng. 519; Taliaferro v. Taliaferro, 6 Ala. 404; Leiper v. Hoffman, 26 Miss.

land is held in trust for the party whose money is paid. This trust arises without any declaration in writing, for it is expressly excepted by the statute of frauds from the

615; *Click v. Click*, 1 Heisk. 607; *Williams v. Van Tuyl*, 2 Ohio St. 336; *Clark v. Clark*, 43 Vt. 685; *Pinney v. Fellows*, 15 Vt. 525; *Dewey v. Long*, 25 Vt. 564; *Lounsbury v. Purdy*, 16 Barb. 376; *McCartney v. Bostwick*, 32 N. Y. 53; *Harder v. Harder*, 2 Sand. Ch. 17; *Jackson v. Woods*, 1 Johns. Cas. 163; *Hoxie v. Carr*, 1 Sum. 187; *Livermore v. Aldrich*, 5 Cush. 435; *Peabody v. Tarbell*, 2 Cush. 232; *Root v. Blake*, 14 Pick. 271; *Kendall v. Mann*, 11 Allen, 15; *Faringer v. Ramsay*, 2 Md. 365; *McGowan v. McGowan*, 14 Gray, 121; 74 Am. Dec. 668; *Dean v. Dean*, 6 Conn. 285; *Powell v. Monson etc. Mfg. Co.*, 3 Mason, 362; *Stewart v. Brown*, 2 Serg. & R. 461; *Jackson v. Matsdorf*, 11 Johns. 91; 6 Am. Dec. 355; *Steere v. Steere*, 5 Johns. Ch. 1; 9 Am. Dec. 256; *White v. Carpenter*, 2 Paige, 218; *Kellogg v. Wood*, 4 Paige, 579; *Partridge v. Havens*, 10 618; *Foote v. Colvin*, 3 Johns. 218; 3 Am. Dec. 478; *Jackson v. Morse*, 16 Johns. 197; 8 Am. Dec. 306; *Forsythe v. Clark*, 3 Wend. 638; *Stratton v. Dialogue*, 16 N. J. Eq. 70; *Nixon's Appeal*, 63 Pa. St. 279; *Foster v. Trustees of Athenæum*, 3 Ala. 302; *Cagle v. McCollum*, 27 Ala. 461; *Mahorner v. Harrison*, 13 Smedes & M. 53; *Walker v. Brungard*, 13 Smedes & M. 764; *Andrews v. Jones*, 10 Ala. 401; *Powell v. Powell*, 1 Freem. Ch. 134; *Salmon v. Symonds*, 30 Cal. 201; *McCarroll v. Alexander*, 48 Miss. 128; *Simson v. Eckstein*, 22 Cal. 580; *Gaines v. Chew*, 2 How. 619; *Tarpley v. Poage*, 2 Tex. 139; *Bludworth v. Lake*, 33 Cal. 256; *Harris v. Reynolds*, 13 Cal. 514; 73 Am. Dec. 600; *Price v. Reeves*, 38 Cal. 457; *Hassey v. Wilkie*, 55 Cal. 525; *Oberthier v. Stroud*, 33 Tex. 522; *Ensley v. Ballentine*, 4 Humph. 233; *Smitheal v. Gray*, 1 Humph. 491; 34 Am. Dec. 664; *Doyle v. Sleeper*, 1 Dana, 536; *Jenison v. Graves*, 2 Blackf. 444; *Creed v. Lancaster Bank*, 1 Ohio St. 1; *Hutchinson v. Hutchinson*, 59 Cal. 313; *Milliken v. Ham*, 36 Ind. 166; *Bruce v. Roney*, 18 Ill. 67; *Smith v. Sackett*, 5 Gilm. 534; *Latham v. Henderson*, 47 Ill. 185; *Albright v. Oyster*, 19 Fed. Rep. 489; *Connor v. Follansbee*, 59 N. H. 124; *Gogherty v. Bennett*, 37 N. J. Eq. 87; *Brown v. Brown*, 77 Va. 619; *Harker v. Reilly*, 4 Del. Ch. 72; *Lipcomb v. Nichols*, 6 Colo. 290; *McNamara v. Garrity*, 106 Ill. 384; *Goldsberry v. Gentry*, 92 Ind. 193; *Lewis v. Montgomery etc. Loan Assn.*, 70 Ala. 276; *Parker v. Coop*, 60 Tex. 111; *Milner v. Freeman*, 40 Ark. 62; *Buren v. Buren*, 79 Mo. 538; *Reynolds v. Reynolds*, 30 Kan. 91; *Boyer v. Libbey*, 88 Ind. 235; *Leggett v. Leggett*, 88 N. C. 108; *Witte v. Wolfe*, 16 S. C. 256; *Sherburne v. Morse*, 132 Mass. 469; *Rupp's Appeal*, 100 Pa. St. 531; *Seibold v. Christman*, 75 Mo. 308; *Robinson v. McDiarmid*, 87 N. C. 455; *Witts v. Horney*, 59 Md. 584; *Law v. Law*, 76 Va. 527; *Ward v. Spivey*, 18 Fla. 847; *Beadle v. Beadle*, 2 McCrary, C. C. 586; *Lawry v. Spaulding*, 73 Me. 31; *Van Sycle v. Kline*, 34 N. J. Eq. 332; *Robinson v. Leflore*, 59 Miss. 148; *Hardin v. Darwin*, 66 Ala. 55; *Stafford v. Wheeler*, 93 Pa. St. 462; *Harrison v. Emery*, 85 N. C. 161; *Walker v. Elledge*, 65 Ala. 51; *Kelly v. Johnson*, 28 Mo. 249; *Frederick v. Haas*, 5 Nev. 389; *Bartlett v. Pickersgill*, 1 Eden, 515; *Rothwell v. Dewees*, 2 Black. 613.

operation of that statute, and the facts necessary to constitute such trust may be proved by parol evidence. A similar rule prevails in cases where the consideration proceeds from two or more persons jointly. A resulting trust will arise in proportion to the amount of the consideration which they may have respectively contributed.”¹ But the payment, in order to raise a resulting trust, must be for some specific part or distinct interest in the estate.²

§ 1151. *Some instances.*—Where A buys land, and takes the deed in the name of B, and the latter advances the purchase money, and takes A’s notes for the same, and agrees to convey to A on repayment of the money advanced and interest, the money advanced by B may be considered as a loan to A, and the land so purchased will be held by B, as trustee for A.³ Where one having a grant of land from the Mexican government dies intestate, and a person erroneously believing himself to be the heir sells a part of the land to another, who, subsequently, acting under the impression that he has acquired a valid title, obtains a confirmation of the grant and a patent from the United States, the true heirs at law are not deprived by the patent of their interest in the property, but the patentee holds the legal title in trust for them.⁴ Where two persons agree with an owner of land to purchase it of him for five hundred dollars, each to have an undivided half, and one of the intending purchasers accepts from the agent of the other a watch in lieu of one hundred and seventy-five dollars, and other chattels, for the purpose of selling them to make up the balance of one-half of the purchase price, cancels a debt due him by the owner, in part payment of the land, and sells the chattels and pays the balance, a resulting trust arises in favor of the other vendee for one-

¹ *Cutler v. Tuttle*, 19 N. J. Eq. (4 Green, O. E.) 549, 558, per Depue, J.

² *McGowan v. McGowan*, 14 Gray, 119, 74 Am. Dec. 668, and cases cited.

³ *Page v. Page*, 8 N. H. 187.

⁴ *Wilson v. Castro*, 31 Cal. 420.

half of the land.¹ A resulting trust does not arise from the agreement of the parties, but from the fact that the purchase money has been paid by one, and the title taken in the name of another.² Where a father purchased land, paying two thousand five hundred dollars for the same, of which sum twelve hundred dollars belonged to one of his sons, and took the deed in his own name, and afterward the son died, leaving his father, mother, and five brothers and sisters as his heirs, and the father, becoming indebted to a large amount, subsequently conveyed the land without consideration to the brothers and sisters of the deceased son, and a suit was brought by the creditors of the father to subject the land to the payment of his debts, it was held that the heirs of the deceased son had a resulting trust in the land, to the extent of twelve undivided twenty-fifths, and that they held the legal title to the remaining thirteen twenty-fifths, subject to the lien of the creditors of the father, as also one-seventh of the twelve twenty-fifths, which was the father's share, as one of the seven heirs of the deceased son.³ But where a father, for the purpose of defrauding his creditors, purchased land in the name of his son, it was decided that the presumption of an advancement to the son was repelled by the intended fraud upon creditors, and therefore the father had a resulting trust, which was subject to sale on execution under judgments obtained by such creditors.⁴ And while, if the purchase price is paid by the husband, and the deed is taken in the name of the wife, it may be presumed that the purchase was an advancement to the wife, yet the transaction is open to explanation, and when it appears that the husband's object was to defraud creditors, he has a resulting trust, subject to sale on execution.⁵ But where a father having an interest in the land has the

¹ *Frederick v. Haas*, 5 Nev. 389.

² *Bruce v. Roney*, 18 Ill. 67.

³ *Latham v. Henderson*, 47 Ill. 185.

⁴ *Rankin v. Harper*, 23 Mo. 579. See, also, *Doyle v. Sleeper*, 1 Dana, 531.

⁵ *Guthrie v. Gardner*, 19 Wend. 414

deed made to his son, who has paid certain debts of the father, and the deed is treated by both father and son as an absolute conveyance, the father having sufficient property to pay all his debts, and no fraudulent intent existing, the conveyance is not fraudulent and void as to the father's subsequent creditors, although the consideration was not equal to the value of the land.¹

§ 1152. **Consideration paid by several.**—It is now well settled, whatever doubt there formerly may have been, that if the consideration money is paid by a number of persons, and the deed is taken in the name of a stranger, the latter will hold the legal title in trust for the joint purchasers.²

§ 1152 a. **Consent that title should be taken in name of another.**—The right of a party to have a resulting trust declared in his favor is not defeated by the fact that he consented that the title to the land should be taken in the name of another.³ A vendor will hold the legal title as trustee for the vendee where the latter has paid the purchase price, taken possession of the land, and improved it with the consent of the vendor, and paid off the debts of the estate.⁴ A subsequent payment will not relate back so as to attach a trust to the original purchase. The trust must arise when the deed is executed.⁵ Where a lease containing an option of purchase was interlined so as to make another a colessee, and both jointly occupied the land, the colessee making valuable improvements, and the original lessee purchased the land, taking the deed in

¹ *Dewey v. Long*, 25 Vt. 564.

² *Larkins v. Rhodes*, 5 Port. 196; *Baumgartner v. Guessfeld*, 38 Mo. 36; *Letcher v. Letcher*, 4 Marsh. J. J. 590; *Wray v. Steele*, 2 Ves. & B. 388; *Keaton v. Cobb*, 1 Dev. Ch. 439; 18 Am. Dec. 595; *Ross v. Hege-*
man, 2 Edw. Ch. 373; *Powell v. Monson etc. Co.*, 3 Mason, 347. See *Jenkins v. Frink*, 30 Cal. 586; 89 Am. Dec. 134; *Hidden v. Jordan*, 21 Cal. 92.

³ *Summers v. Moore*, 113 N. C. 394.

⁴ *Ryder v. Loomis*, 161 Mass. 161.

⁵ *Moorman v. Arthur*, 90 Va. 455.

his own name, it was decided that the purchase inured to the benefit of the colessee, who, on payment of one-half of the purchase price, was entitled to a conveyance of a half interest.¹ A resulting trust may be created by a parol contract by which a purchaser is to buy the land and hold it for the joint benefit of himself and another.²

§ 1153. Deed taken in the name of one joint purchaser.—So, where several parties contribute to the purchase of land, and the deed is taken in the name of one of them, each of the others has a resulting trust in the land in the proportion which the amount that he paid bears to the whole consideration price.³ “The rule is well settled that when land is purchased for which one party pays the consideration and another party takes the title, a resulting trust immediately arises in favor of the party paying the consideration, and the other party becomes his trustee; and it is now equally well settled that if the one party pays only a part of the consideration, the party taking the title to the whole land becomes a trustee for the other party *pro tanto*.”⁴ Where land is purchased at a tax sale

¹ *Barbour v. Johnson*, 21 D. C. 40.

² *Towle v. Wadsworth*, 147 Ill. 80.

³ *Buck v. Swazey*, 35 Me. 41; 56 Am. Dec. 681; *Seaman v. Cook*, 14 Ill. 501; *Frederick v. Haas*, 5 Nev. 389; *Thomas v. Thomas*, 62 Miss. 531; *Bear v. Koenigstein*, 16 Neb. 65; *Jackson v. Bateman*, 2 Wend. 570; *Cloud v. Ivie*, 28 Mo. 578; *Morey v. Herrick*, 18 Pa. St. 129; *Purdy v. Purdy*, 3 Md. Ch. 547; *Rigden v. Walker*, 3 Atk. 735; *Stewart v. Brown*, 2 Serg. & R. 461; *Jackson v. Moore*, 6 Cowen, 706; *James v. James*, 41 Ark. 301; *Clark v. Clark*, 43 Vt. 685; *Bogert v. Perry*, 17 Johns. 351; 8 Am. Dec. 411; *Case v. Codding*, 38 Cal. 191; *Baumgartner v. Guesfeld*, 38 Mo. 36; *McDonald v. McDonald*, 24 Ind. 68; *Dow v. Jewell*, 18 N. H. 340; 45 Am. Dec. 371; *Brown v. Brown*, 77 Va. 619; *Kelley v. Jenness*, 50 Me. 455; 79 Am. Dec. 623; *Union College v. Wheeler*, 5 Lans. 160. See *Dikeman v. Norrie*, 36 Cal. 94; *Beadle v. Seat*, 102 Ala. 532; 15 So. Rep. 243.

⁴ *Case v. Codding*, 38 Cal. 191, per Rhodes, J., and cases cited. See, also, *Pierce v. Pierce*, 7 Mon. B. 433; *Lake v. Gibson*, 1 Eq. Cas. Abr. 291; *Brothers v. Porter*, 6 Mon. B. 106; *Quackenbush v. Leonard*, 9 Paige, 334; *Powell v. Monson etc. Mfg. Co.*, 3 Mason, 347; *Botsford v. Burr*, 2 Johns. Ch. 405; *Shoemaker v. Smith*, 11 Humph. 81; *Hall v. Young*, 37 N. H. 134; *Bernard v. Bongard*, Har. (Mich.) 130; *Pinney v. Fellows*, 15 Vt. 525.

by one under an agreement that another shall have an equal interest, the former holds the title for both as tenants in common.¹ But where two persons separately purchase distinct parcels of land from the same grantor, the title to which proves to be void, one of them can subsequently acquire the true title to both of the different parcels, and he will not hold the title as trustee for the other.² An application was made to the proper officer for a grant of several lots of land for the mutual benefit of three persons, A, B, C, who agreed among themselves that A should pay the purchase money to the State for the lands as the same became due, and should obtain the patents, and that he should receive the purchase money and interest out of the sale of the land, and that on the payment of the money due to him, he should release one-third of the land to B and C respectively. Subsequently the executors and trustees of A paid the purchase money and received the patents. B transferred his interest in the land to another person by an absolute deed, but really as security for a debt of one thousand four hundred and eighty dollars. The creditor afterward sold his interest in the land to the executors and trustees of A for one thousand dollars only. The court held that the executors and trustees of A took the legal title to the land as trustees for those having a beneficial interest in the land under the agreement, and that as the deed from B was only a mortgage, such executors and trustees of A were entitled to hold the mortgage for the amount which they paid for it and interest, and not for the amount for which it was originally given.³

§ 1154. Interests acquired.—It is said that in the absence of proof as to the exact amount of money con-

¹ *Stewart v. Brown*, 2 Serg. & R. 461.

² *Collins v. Bartlett*, 44 Cal. 371.

³ *Quackenbush v. Leonard*, 9 Paige, 334. Land was purchased by six persons who contributed equally to the purchase price, and the title was placed in one of the purchasers, who executed an instrument declaring that he held it in trust for all, which was not recorded. A partition was subsequently made whereby one-half of the land was conveyed to three of the purchasers, and they in turn conveyed to him their interest

tributed by each for the purchase, the law will presume that the parties contributed equally.¹ A party may by the same deed take an undivided portion of the land to himself in his own right, and be charged as a trustee for other portions of the same land. He subsequently may purchase and take a deed to himself of the interests of some or all of his *cestuis que trust*, and then he ceases to be a trustee, but becomes the absolute owner of the shares which he purchases.² Where A has mortgaged his land to B, with covenants of warranty, and subsequently, having paid the amount due on a prior mortgage, takes an assignment of the mortgage to himself, the title which he thus acquires would in the absence of explanation inure to the benefit of B. But if the fact is that C purchased the prior mortgage and paid the consideration, and A after its assignment to him by a previous agreement assigned it to C, or assigned it in blank and delivered it to C, with power to fill the blank, the assignment to A being clearly for the benefit of C, an implied resulting trust in his favor at once arises and attaches to the assignment made by the first mortgagee to A. If, however, a part of the money was paid by A and a part by C, the trust in favor of C extends only to the amount paid by him.³ If an agreement is made by two proprietors of land, that one of them shall under a certain statute purchase an adjoining tract of government land, and that both shall furnish an equal sum of money to pay the price, and that the one who enters shall convey one half of the land to the other, and he enters under this agreement, a resulting trust arises in favor of the one advancing one half the money, as to one half of the land.⁴

in the other portions, which he was to hold in trust for himself and the other two purchasers, who paid equal portions of the bonus paid by them in the partition. The other two purchasers were held to have a resulting trust in the land: *Rogers v. Donnellan*, 11 Utah, 108; 39 Pac. Rep. 494.

¹ *Shoemaker v. Smith*, 11 Humph. (30 Tenn.) 81.

² *Jackson v. Moore*, 6 Cowen, 706.

³ *Kelley v. Jenness*, 50 Me. 455; 79 Am. Dec. 623.

⁴ *Cloud v. Ivie*, 28 Mo. 578. The interest acquired is the proportion

§ 1155. **Purchase of specific part.**—A resulting trust will not arise in favor of one of several joint purchasers, unless his part is some definite portion of the whole, and the money paid by him is for some aliquot part of the property.¹ "Such a trust can only arise in favor of a person who claims to have furnished the consideration money, when such consideration or some aliquot part thereof was furnished as part of the original transaction at the time the purchase was made. The party claiming the benefit of the resulting trust, must have occupied a position originally which would have entitled him to be substituted in the place of him to whom the conveyance has been made."² No resulting trust can arise where the proportions paid by the respective parties are uncertain.³

§ 1156. **Deed taken by agent.**—If an agent purchases property with the money belonging to his principal without the latter's knowledge, or if the agent has the deed made out in his own name against the consent of the principal, a resulting trust arises in favor of the principal.⁴

which the amount paid by one bears to the whole price. *Collins v. Corson* (N. J. Ch. Dec. 26, 1894), 30 Atl. Rep. 862.

¹ *Olcott v. Bynum*, 17 Wall. 44; *Cuttler v. Tuttle*, 19 N. J. Eq. 561; *McGowan v. McGowan*, 14 Gray, 119; 74 Am. Dec. 668; *White v. Carpenter*, 2 Paige, 217; *Reynolds v. Morris*, 17 Ohio St. 510; *Baker v. Vining*, 30 Me. 121; 50 Am. Dec. 617; *Sayre v. Townsends*, 15 Wend. 647. See *Hidden v. Jordan*, 21 Cal. 92.

² *Perry v. McHenry*, 13 Ill. 227, 238, per Trumbull, J.

³ *Baker v. Vining*, 30 Me. 121; 50 Am. Dec. 617. Said the court, per Tenny, J: "And no case has been found where a resulting trust has been held to arise upon payments made in common by the one asserting his claim, and the grantee in the deed, wherein the grantor acknowledges the receipt of the consideration from him alone, when the amount belonging to one and the other is uncertain, and unknown even to those who make the payments; and no satisfactory evidence is offered exhibiting the portion which was really the property of each. The trust springs from a presumption of law, because the alleged *cestui que trust has paid the money*. Such presumption must be attended with no uncertainty. The whole foundation is the payment, and this must be clearly established."

⁴ *Follansbee v. Kilbreth*, 17 Ill. 522; 65 Am. Dec. 691; *Pugh v. Pugh*, 9 Ind. 132; *Day v. Roth*, 18 N. Y. 448; *Seichrist's Appeal*, 66 Pa. St.

A, under a contract for the purchase of a lot from B, entered into possession, and made certain improvements, but being unable to meet the payments, sold a part of the lot to C by parol, they both having agreed upon the division line. B, the owner of the land, with the consent of A, executed a deed for the whole lot to C, the latter agreeing with A to hold the other part of the lot in trust for A, and to convey such portion to him on the receipt of A's share of the purchase money. A continued in possession of his part, according to the line agreed upon, and upon C's refusal to convey, it was held that he held in trust for A, and could be compelled to convey.¹ The *cestui que trust* when he discovers the fraud may repudiate the transaction, thus relieving himself of his equitable title, or he may waive the fraud and assert his rights as *cestui que trust*; he may also lose his equitable title, by laches, fraud, or agreement.² Where the agent takes the title by fraud in his own name, he becomes a trustee *ex maleficio*.³ An agent having a sum of money in his hands belonging to his principal, wrote to her a letter admitting that he held the money for investment on her account, and requesting a power of attorney to invest the same, and she sent the power of attorney. There was no other evidence to show upon what understanding the agent had received the money. He subsequently invested the money by buying real estate, the deed for which was made out in his brother's name. The court held that the letter was proper evidence for the purpose of showing that the

237; Squire's Appeal, 70 Pa. St. 268; Bridenbecker v. Lowell, 32 Barb. 9. And see Robb's Appeal, 41 Pa. St. 45; Eshleman v. Lewis, 49 Pa. St. 410; Wynn v. Sharer, 23 Ind. 573; Church v. Sterling, 16 Conn. 388; Farmers' etc. Bank v. King, 57 Pa. St. 202; 98 Am. Dec. 215; Moffitt v. McDonald, 11 Humph. 457; Bank of America v. Pollock, 4 Edw. Ch. 215. See Kluender v. Fenske, 53 Wis. 118; Roberts v. Haley, 65 Cal. 397.

¹ Seichrist's Appeal, 66 Pa. St. 237. See, also, Gashe v. Young, 51 Ohio St. 376; 38 N. E. Rep. 20.

² Follansbee v. Kilbreth, 17 Ill. 522; 65 Am. Dec. 691.

³ Squires' Appeal, 70 Pa. St. 266; Follansbee v. Kilbreth, 17 Ill. 522; 65 Am. Dec. 691.

money was held in trust, and that the agent was not a mere debtor, and that the principal had a resulting trust in the property so purchased.¹ So where the consideration for the purchase of land is real estate of the principal, a trust in his favor will result, where an agent for the purchase of real estate has the deed made in favor of his wife, and such trust is not affected by the fact that the principal had knowledge that the deed was so executed, and consented to the transaction.²

§ 1157. **Payment made with agent's funds.**—But where an agent purchases land with his own money, using no money of the principal, a resulting trust cannot be raised by parol evidence. Whatever trust there may be in a case of this kind, does not arise from the transaction itself, but from the agreement between the parties, and a trust created by express agreement must, under the statute of frauds, be in writing. “We think the doctrine well sustained that, where one man merely employs another by parol as an agent to purchase real property for him, and the person thus employed purchases the land in his own name, and no part of the purchase money is paid by the principal, and the agent denies the trust, it would directly overturn the statute of frauds to admit any other evidence than that which the statute requires.”³ Where A agrees by parol with B that he will attend a sale of B's

¹ *Day v. Roth*, 18 N. Y. 448.

² *Bostleman v. Bostleman*, 24 N. J. Eq. 103.

³ *Burden v. Sheridan*, 36 Iowa, 125, 134; 14 Am. Rep. 505, per Miller, J., who examines several of the cases at length. See, also, *Dorsey v. Clarke*, 4 Har. & J. 551; *Kennedy v. Keating*, 34 Mo. 25; *Pinnock v. Clough*, 16 Vt. 500, 507; 42 Am. Dec. 521; *Pearson v. East*, 36 Ind. 28; *Flagg v. Mann*, 2 Sum. 486, 546; *Nestal v. Schmid*, 29 N. J. Eq. 458; *Taliaferro v. Taliaferro*, 6 Ala. 406; *Minot v. Mitchell*, 30 Ind. 228; 95 Am. Dec. 685; *Heacock v. Coatesworth, Clarke*, 84; *Fowke v. Slaughter*, 3 Marsh. A. K. 57; 13 Am. Dec. 133; *Walker v. Brungard*, 13 Smedes & M. 765; *Moore v. Green*, 3 Mon. B. 407; *Arnold v. Cord*, 16 Ind. 177; *Woodhull v. Osborne*, 2 Edw. Ch. 615; *Jackman v. Ringland*, 4 Watts & S. 149; *Lathrop v. Hoyt*, 7 Barb. 60; *Lamas v. Bayly*, 2 Vern. 627; *O'Hara v. O'Neil*, 2 Brown Parl. C. 39; *Atkins v. Rowe*, Mos. 39; *Rastel v. Hutchinson*, 1 Dick. 44; *Bartlett v. Peckersgell*, 1 Edg. 515.

farm under a decree of foreclosure, bid off the premises, take a deed in his own name, and agrees to let B have an opportunity to repay the amount bid, and secure a reconveyance, the agreement it is held is void, as being within the statute of frauds, and B has no resulting trust.¹ And where a guardian who is indebted to his ward purchases land, declaring it to be for the ward, and putting the ward in possession, but paying for the land with his own money and taking the title in his own name, no resulting trust arises, and the ward has no title to the land when no proof is made of an agreement that the land was to be given to the ward in payment of the debt.²

§ 1158. **Agent at execution sale.**—But if the principal furnishes the consideration, whether in money or other property, and the agent takes the title in his own name, a resulting trust is created.³ Thus, a sheriff was about to sell certain real estate under an execution, and the judgment creditor requested a person to attend the sale as his agent, and in case the bids were not in excess of the judgment, to purchase the property, and have the amount bid credited by the sheriff on the execution. The agent made a bid as directed, and the amount bid was credited on the execution, but he took the certificate of purchase in his own name, instead of in that of the judgment creditor, and subsequently received a deed. The court decided that he held the title in trust for the judgment creditor.⁴ Where a written contract is made by several persons that one of them shall purchase for the benefit of all, land about to be sold under an execution, each to supply his share of the money, and the purchaser to convey to each, one of the contracting parties cannot, after the purchase is effected, by securing another judgment, redeem the property and obtain the title for himself. He will become a trustee, holding the legal title in trust for all the parties

¹ *Lathrop v. Hoyt*, 9 Barb. 59.

² *Taliaferro v. Taliaferro*, 6 Ala. 404.

³ *Currey v. Allen*, 34 Cal. 254.

⁴ *Currey v. Allen*, 34 Cal. 254.

interested in the contract.¹ A husband having given a note for his own indebtedness, his wife, for the purpose of securing its payment, executed jointly with him a mortgage upon land which he had previously conveyed to her by a deed of gift. This deed was duly recorded. The mortgage subsequently was foreclosed, and a person purchased the land for the husband with the latter's money, and conveyed the land to him. For the purpose of securing an antecedent indebtedness, the husband afterward conveyed the land to one who took without actual notice. The act of the husband in purchasing through an agent was but the payment of his own debt; and, therefore, he took the title in trust for his wife. As to the second mortgagee, the court held that the records were sufficient to put him upon inquiry, and that he was compelled at his own risk to acquire information as to the facts.²

§ 1159. **Partnership funds.**—Where one partner purchases real estate with partnership funds, and takes the deed in his own name, the other partners have a resulting trust equivalent to their share in the partnership. "We could not deny," said Mr. Justice Black, "the correctness of this proposition, without saying that one partner may, with the consent of the other, buy property for the benefit of both, and afterward appropriate it entire to his own use, because he got the deed in his own name. This would establish a rule under which one partner could always cheat another out of his own share. It would be a premium on bad faith, and the highest reward that could be offered for the violation of bargains, and the disregard of justice, truth, and conscience."³

¹ *Jenkins v. Frink*, 30 Cal. 586; 89 Am. Dec. 134.

² *Hassey v. Wilke*, 55 Cal. 525.

³ In *Coder v. Huling*, 27 Pa. St. 84, 88. See, also, *Smith v. Burnham*, 3 Sum. 435; *McCully v. McCully*, 78 Va. 159; *Homer v. Homer*, 107 Mass. 85; *Richards v. Manson*, 101 Mass. 482; *Philips v. Crammond*, 2 Wash. C. C. 401; *Pugh v. Currie*, 5 Ala. 446; *Baldwin v. Johnston*, Saxt. Ch. 441; *Oliver v. Piatt*, 3 How. 401; *Winkfield v. Brinkman*, 21 Kan. 682; *Edgar v. Donnally*, 2 Munf. 387; *Evans v. Gibson*, 29 Mo. 223; 77 Am. Dec. 565; *Turner v. Pettigrew*, 6 Humph. 438; *Jenkins v. Frink*, 30 Cal.

Under a verbal agreement between A and B to purchase and improve real estate, sharing equally the profits and losses, two farms were purchased which were conveyed to them jointly. Their agent contracted for a third farm in his own name, but A, without B's knowledge or consent, had the contract assigned to himself, and secured a conveyance of the farm. Both A and B made permanent improvements at various times upon, and purchased cattle for, each of the farms. They treated all three farms alike, and B, with A's knowledge, superintended work performed upon the third farm, and made payments therefor. Both A and B visited such farms together, and had various conversations relative to the disposition of an interest therein, and A did not at any time intimate that B was not also as to this farm a joint owner, and B advanced money at different times on account of purchases for all three farms. The court held that A having taken title to such third farm, in fraud of the rights of B, the latter had a resulting trust therein, and that it was unnecessary for him to seek a dissolution of the partnership and an accounting, but that he was entitled to a conveyance from A of an undivided interest in the farm.¹

§ 1160. Guardian and ward.—A ward has a resulting trust in land purchased with his money by his guardian, the deed for which is made to the guardian.² And where

586; 89 Am. Dec. 134; *Settembre v. Putnam*, 30 Cal. 490; *Freeman v. Kelly*, Hoff. Ch. 90; *Smith v. Ramsey*, 1 Gilm. 373; *Mallory v. Mallory*, 5 Bush, 464; *Ebbert's Appeal*, 70 Pa. St. 79; *Weinrich v. Wolf*, 24 W. Va. 299. See *Warren v. Schainwald*, 62 Cal. 56.

¹ *Traphagen v. Burt*, 67 N. Y. 30, and cases cited. Where two brothers owning adjoining farms, engaged in farming in partnership and one of them bought a tract of adjacent land under an agreement that the north half should belong to him and the south half to his brother, paying for land with partnership funds and taking the title in his own name, it was decided that he held title to the south half in trust for his brother: *Van Buskirk v. Van Buskirk*, 148 Ill. 9. Where land belonging to a firm is conveyed by consent to one of the partners, the fact that the land was paid for by partnership funds will not create a resulting trust: *Gunnison v. Erie Dime Savings and Loan Co.*, 157 Pa. St. 303.

² *Bancroft v. Consen*, 13 Allen, 50; *Caplinger v. Stokes*, Meigs, 175; *Puigh v. Puigh*, 19 Ind. 132; *Lee v. Fox*, 6 Dana, 171. See *Robinson v.*

the deed acknowledges the receipt of the consideration paid by him, "guardian of the minor children" of a person named, but the deed is made to himself, his heirs and assigns, without referring in any other mode to his guardianship, creditors of the guardian have sufficient notice that the land is held by him in trust.¹ But if the guardian pay for the land with his own money, declaring the purchase at the time to be for the benefit of his ward, the latter cannot claim a trust, because such a trust is void by the statute of frauds.²

§ 1161. **Wife's separate property.**—The same principle applies where a husband takes a deed in his own name for land purchased with the separate property of his wife. She has a resulting trust.³ She may elect to charge her husband personally, or claim the land as her own, and if part of her funds only were used in the purchase, she has a resulting trust to the extent of that part.⁴ When the husband has conveyed the land so purchased to a third person, who has notice of the manner in which the husband acquired it, such third person is also charge-

Robinson, 22 Iowa, 427; *Pillars v. McConnell*, 141 Ind. 670; 40 N. E. Rep. 689. The right to enforce a resulting trust is not defeated by the fact that the ward can sue at law to recover the money used by the guardian in the purchase of the land in his own name: *Thompson v. Hartline*, 105 Ala. 263; 16 So. Rep. 711.

¹ *Bancroft v. Consen*, 13 Allen, 50.

² *Kisler v. Kisler*, 2 Watts, 323; 27 Am. Dec. 308; *Snell v. Elam*, 2 Heisk. 82; *Johnson v. Dougherty*, 18 N. J. Eq. 406.

³ *Goldsberry v. Gentry*, 92 Ind. 193; *Fillman v. Divers*, 31 Pa. St. 429; *Kline's Appeal*, 39 Pa. St. 463; *Tilford v. Torrey*, 53 Ala. 120; *Pritchard v. Wallace*, 4 Sneed, 405; 70 Am. Dec. 254; *Pinney v. Fellows*, 15 Vt. 525; *Resor v. Resor*, 9 Ind. 347; *Barron v. Barron*, 24 Vt. 375; *Davis v. Davis*, 46 Pa. St. 342; *Raybold v. Raybold*, 20 Pa. St. 308; *Woodford v. Stephens*, 51 Mo. 443; *Darkin v. Darkin*, 23 L. J. Ch. 890; *Lench v. Lench*, 10 Ves. 511; *Wallace v. McCullough*, 1 Rich. Eq. 426; *Carter v. Bolin*, (Tex. App., May 15, 1895), 30 S. W. Rep. 1084; *Berry v. Wiedman*, 40 W. Va. 36; 20 S. E. Rep. 817; *Howard v. Howard*, 52 Kan. 469; *Irick v. Clement*, 49 N. J. Eq. 590. See *Parker v. Coop*, 60 Tex. 111; *Derry v. Derry*, 74 Ind. 560.

⁴ *Tilford v. Torrey*, 53 Ala. 120. What her rights under the rule at the common law would be, see *Waldrow v. Sanders*, 85 Ind. 270; *Westerfield v. Kimmer*, 82 Ind. 365.

able with the trust.¹ Where a son obtains money from his mother to purchase land, on the understanding that he is to take the deed in his own name and hold the title for her benefit, and the son pays the money to the vendor, and the latter, at the request of the son's wife, who has knowledge of the facts, executes a deed to her, she holds the title in trust for the mother.² If a husband purchases land with his wife's money, and subsequently sells and exchanges it for another tract of land, she still has a right to pursue her money, and to fasten a trust on the land received by the husband in exchange.³ Where a wife takes title in her own name to land purchased with a fund belonging partly to the husband and partly to the wife, and she agrees on her husband's request to convey to him, there is a resulting trust in his favor.⁴

§ 1161 a. **Protection of wife's rights.**—Where land is purchased by a husband with money belonging to his wife, and the title is placed in his name without her consent, the trust arising in her favor will be protected against the claims of the creditors of the husband, unless the debts were contracted on the faith of his ownership of the property.⁵ It is not essential, to create a resulting trust in favor of a wife, that the purchase money should have been paid at the time the land was purchased, but the trust will arise if it be paid as installments or as encumbrances fall due, in conformity with a contract of purchase and under an agreement that she is to recover so much as she pays for.⁶ But if a wife lends money, which

¹ *Methodist Episcopal Church v. Jacques*, 1 Johns. Ch. 450.

² *Wormouth v. Johnson*, 58 Cal. 622. Where two parcels of land, descending to a wife and other heirs, are bid in at an auction by her husband, and one of the parcels is paid for by crediting him with the wife's distributive share of the estate, he holds such parcel as trustee for his wife, but he is not a trustee as to the other parcel which he paid for in cash, with the money either of himself or his wife: *Cooksey v. Bryan*, 2 App. D. C. 557.

³ *Walker v. Ellledge*, 65 Ala. 51. See *English v. Law*, 27 Kan. 242.

⁴ *Harden v. Darwin*, 66 Ala. 55.

⁵ *Hews v. Kenney*, 43 Neb. 815.

⁶ *Gilchrist v. Brown*, 165 Pa. St. 295; 44 Am. St. Rep. 664.

constitutes part of her separate estate, to her husband to complete the payment due for a tract of land, and he agrees that the debt shall be a charge upon the land until paid, the debt at his death is not entitled to priority or lien over other unsecured claims against his estate.¹ Nor, where there has been a lapse of several years during which the wife has remained silent, and she has not asserted her claim until after her husband's death, and it appears that the contribution made by the husband greatly exceeded that made by the wife, although he may have promised to take the deed in her name, still a resulting trust will not be decreed.²

§ 1162. **Trust funds, generally.**—The preceding sections are but illustrations of the general rule that when any person occupying the position of a trustee purchases land with trust funds, taking a deed in his own name, the beneficiary may claim the benefit of the purchase. This rule prevails with respect to all who occupy a fiduciary character. Thus, an administrator or executor, purchasing land with the property of the estate, holds as a trustee for those beneficially interested in the estate.³ So with respect to the committee of a lunatic,⁴ or to the trustee of a corporation.⁵ It is sufficient if the general character of

¹ *Loftis v. Loftis*, 94 Tenn. 232.

² *Schierloh v. Schierloh*, 72 Hun, 150.

³ *Stow v. Kimball*, 28 Ill. 93; *Dodge v. Cole*, 97 Ill. 338; 37 Am. Rep. 111; *Garrett v. Garrett*, 1 Strob. Eq. 96; *Buck v. Uhrich*, 16 Pa. St. 490; *White v. Drew*, 42 Mo. 561; *Barker v. Barker*, 14 Wis. 131; *Schaffner v. Grutzmacher*, 6 Clark, 137; *Williams v. Hollingsworth*, 1 Strob. Eq. 103; 47 Am. Dec. 527; *Harper v. Archer*, 28 Miss. 212; *Wallace v. Duffield*, 2 Serg. & R. 521; 7 Am. Dec. 660; *Seaman v. Cook*, 14 Ill. 501. And see *Roberts v. Opp*, 56 Ill. 34; *Musham v. Musham*, 87 Ill. 80; *Fox v. Doherty*, 30 Iowa, 334; *Kirkpatrick v. McDonald*, 11 Pa. St. 387; *Hancock v. Titus*, 39 Miss. 224; *Valle v. Bryan*, 19 Mo. 423; *Neill v. Keese*, 13 Tex. 187; *Harrisburg Bank v. Tyler*, 3 Watts & S. 373; *Wilhelm v. Folmer*, 6 Pa. St. 296.

⁴ *Buffalo R. R. Co. v. Lamson*, 47 Barb. 533; *Reid v. Fitch*, 11 Barb. 399; *Turner v. Pettigrew*, 6 Humph. 438. See *Hannett's Appeal*, 72 Pa. St. 337.

⁵ *Methodist Episcopal Church etc. v. Wood*, 5 Ohio, 283; *Church v. Sterling*, 16 Conn. 388.

the trust fund can be identified.¹ A person died leaving surviving him a widow and four children, and the widow administered on his estate and managed it for thirty-seven years. She at first, in the joint names of herself and children, and subsequently in her own name, with their assent and knowledge, invested and reinvested the proceeds, and she furnished all the supplies for the family, they all living together. It was held that the widow was to be treated as a trustee in these investments for those interested in the estate.² If a trustee purchase an interest, the retention of which by him would materially affect the trust property, he holds it in trust for the *cestui que trust*.³

§ 1163. Attorney's knowledge of defect in judicial proceedings.—Where an attorney conducts a suit to obtain the title to land for his client, the title, however, by reason of defects in the proceedings not passing, and the

¹ *Campbell v. Walker*, 5 Ves. 678; *Sanderson v. Walker*, 13 Ves. 601; *United States v. Waterborough, Davies*, 154; *Overseers of the Poor v. Bank of Virginia*, 2 Gratt. 544; 44 Am. Dec. 399; *De Bevoise v. Sanford*, Hoff. Ch. 194; *Downes v. Grazebrook*, 3 Mer. 200; *McLarren v. Brewer*, 51 Me. 402. And see *Thompson's Appeal*, 22 Pa. St. 16.

² *Seaman v. Cook*, 14 Ill. 501. "Any application or appropriation of these funds to her sole use and benefit would be, by our law, a violation of her trust, and it will not lie in her mouth, or avail to allege a breach of confidence and a violation of trust and duty, as the ground of title to her principal's estate. For if these investments were not made for the use of the principals, but her own, it was a breach of trust, a misapplication of their money, and a violation of her duty. This the law will not presume to have been the intention, but will treat it as a resulting trust to the owners of the money." See, also, *Wallace v. Duffield*, 2 Serg. & R. 529; 7 Am. Dec. 660.

³ *Jenkins v. Frink*, 30 Cal. 586; 89 Am. Dec. 134; *Settembre v. Putnam*, 30 Cal. 490; *Campbell v. Campbell*, 21 Mich. 438; *Van Epps v. Van Epps*, 9 Paige, 237; *Dickinson v. Codwise*, 1 Sand. Ch. 226; *Holmes v. Campbell*, 10 Minn. 401; *Heath v. Page*, 63 Pa. St. 108; 3 Am. Rep. 533; *Hall v. Vanness*, 49 Pa. St. 457; *Harrold v. Lane*, 53 Pa. St. 269; *Torrey v. Bank of Orleans*, 9 Paige, 649; *Clark v. Cantwell*, 3 Head, 302; *Holt v. Holt*, 1 Ch. Cas. Ch. 190; *Tanner v. Elworthy*, 4 Beav. 487; *Geddings v. Geddings*, 3 Russ. 241; *Nesbitt v. Tredennick*, 1 Ball & B. 46. Where a trustee pays half the purchase price of land with trust funds, but subsequently accounts for the funds so used with interest, the land is not subject to a resulting trust: *In re Ricker's Estate*, 14 Mont. 153.

attorney, after the relation of attorney and client had ceased, having discovered such defects, purchases the property for the benefit of another, the original client and such purchaser are to be deemed strangers. Hence, in the absence of actual fraud, the legal title is not held in trust.¹

§ 1164. **Investment of stolen money.**—Where a clerk steals goods or money from the store of his employer, and invests the same in land, it is held that the employer can hold neither the clerk nor his representatives, after his death, as trustees, so as to secure a conveyance to himself of the legal title.² “It is not at all,” said Ruffin, C. J., “like the cases of dealings with trust funds by trustees, executors, guardians, factors, and the like, in which the owner of the fund may elect to take either the money or that in which it was invested. For, in all those cases, the legal title, if we may use the expression, of the fund, is in the party thus misapplying it. He has been intrusted with the whole possession of it, and that for the purpose of laying it out for the benefit of the equitable owner; and, therefore, all the benefit and profit the trustee ought, in the nature of his office, and from his relation to his *cestui que trust*, to account for to that person. But the case of a servant or shopkeeper is very different. He is not charged with the duty of investing his employer’s stock, but merely to buy and sell at the counter. The possession of goods or money is not in him but in his master; so entirely so that he may be convicted of stealing them, in which both a *cepit* and *asportavit* are constituents. This person was, in truth, guilty of a felony in possessing himself of the plaintiff’s effects for the purpose of laying them out for his own lucre; and that fully rebuts the idea of converting him into a trustee. If that could be done, there would be at once an end to punishing thefts by shopmen. If, indeed, the

¹ Learned v. Haley, 34 Cal. 608.

² Campbell v. Drake, 4 Ired. Eq. 94; Pascoag Bank v. Hunt, 3 Edw. Ch. 583.

plaintiff could actually trace the identical money taken from him into the hands of a person who got it without paying value, no doubt he could recover it, for his title was not destroyed by the theft. But we do not see how a felon is to be turned into a trustee of property merely by showing that he bought it with stolen money. If it were so there would have been many a bill of the kind. But we believe there never was one before, and therefore we cannot entertain this."¹

§ 1165. **Comments.**—Of course, there are some difficulties connected with this question. A suit to charge the purchaser with a trust under these circumstances, renders it necessary to inquire into the commission of a criminal offense. But it would seem on well-established equitable principles, where it can be proven that the identical property was used in the purchase of the land, that the purchaser should be held to be a trustee. The general rule in regard to stolen property is that the owner is not divested of his title, and his rights to a recovery are not impaired by a transfer to a *bona fide* purchaser.² And it seems to us that if the identity of the stolen property with the consideration for the purchase can be proven, the person who has converted stolen property into real estate should be considered as holding such land for the owner, to the same extent as if the original stolen property had never left his possession. The question seems to be one of evidence, of proof, rather than one of the existence of an equitable right, which, we think, in the interests of justice, ought not to be denied.³

§ 1166. **Surrender of contract for purchase of real estate.**—A entered into an agreement with the subagent

¹ In *Campbell v. Drake*, 4 Ired. Eq. 94. But see *Wells, Fargo & Co. v. Robinson*, 13 Cal. 133.

² *Bassett v. Spofford*, 45 N. Y. 387; 6 Am. Rep. 101; *Newton v. Porter*, 5 Lans. 417; *Silsbury v. McCoon*, 3 Comst. 379; 53 Am. Dec. 307; *Thompson v. Parker*, 3 Mason, 382; *Hoffman v. Carow*, 22 Wend. 285.

³ See *Bank of America v. Pollock*, 4 Edw. Ch. 215. And see the late case of *Grouch v. Hazlehurst Lumber Co.* (Miss., Nov. 12, 1894), 16 So. Rep. 496.

of the trustees of an estate for the purchase of a piece of land, and after making a part payment and improving a portion of the land, sold his right to B, who, in the year following, died, leaving as his heirs a widow and minor children. B's widow surrendered the original contract made by A, the right to which was purchased by her husband, and had a new contract for the purchase of the land executed to her in her own name. She transferred the contract thus obtained to C, who surrendered this one likewise, and took out a new contract in his own name. It was held that by taking the new agreement the widow occupied the relation of trustee for the heirs of her husband, and that her vendee having knowledge of the condition of the title, and of A's possession, stood on the same footing, which was not altered by the surrender of the contracts, and the execution of new ones by the owner of the legal title.¹ And where a widow in possession of premises for which a deed had been made to her husband, but which is defective for want of a proper description, has a deed executed to her to cure such defect without the payment of any new consideration, she holds the title thus acquired in trust for her husband's heirs.²

§ 1167. Tenants in common.—Where a person claiming and exercising acts of ownership over a piece of land dies, and his possession descends to his heirs as tenants in common, and one of such heirs, who is also executor of the decedent's will, secures a deed in his own name from a person claiming to have a perfect title, such purchaser cannot hold the land against his tenants in common.³ But if the tenants in common have title to the land in fee, and one of them buys an outstanding claim of title which is void, an implied trust as to such void claim in favor of his cotenants cannot be raised in the absence of an agreement that such purchase should be for

¹ Hall v. Vanness, 49 Pa. St. 457.

² Campbell v. Campbell, 21 Mich. 438.

³ Keller v. Auble, 58 Pa. St. 410; 98 Am. Dec. 297.

the use of his cotenants.¹ Where a tenant for life in possession purchases an adverse title, the purchase will be considered as having been made for the benefit of himself and remainderman or reversioner. He cannot retain it for his exclusive benefit upon contribution from others holding by way of remainder or reversion.²

§ 1168. Deed to wife or child.—Where the person who pays the consideration for the purchase of land takes a deed in the name of his wife, or one or more of his children, or of some person to whom he owes some moral or legal obligation, the rule is that it will be presumed that this was done as an advancement. It has already been pointed out that the reason on which is based the equitable principle of resulting trusts is that the party, by the payment of the money, intended some benefit for himself, notwithstanding the deed was not taken in his own name, but in that of a stranger. But when the deed is made to some person to whom he is under an obligation to provide, this reason can no longer be urged. The contrary presumption results that he intended the transaction to be what it in form is—a conveyance to the grantee for the latter's sole use and benefit.³ "It is a

¹ *Mandeville v. Solomon*, 33 Cal. 38. "It will be of no value to the plaintiff," said the court, "if transferred to him, and the court will therefore refuse to order so vain a thing as the transfer of an undivided half of nothing."

² *Whitney v. Salter*, 36 Minn. 103; 1 Am. St. Rep. 656.

³ *Stanley v. Brannon*, 6 Blackf. 193; *Dickenson v. Davis*, 44 N.H. 647; *Thompson v. Thompson*, 1 Yerg. 97; *Welton v. Devine*, 20 Barb. 9; *Knouff v. Thompson*, 16 Pa. St. 357; *Douglass v. Price*, 4 Rich. Eq. 322; *Fleming v. Donahoe*, 5 Ohio, 255; *Miller v. Blose*, 30 Gratt. 744; *Guthrie v. Gardner*, 19 Wend. 414; *Shaw v. Read*, 47 Pa. St. 95; *Shepherd v. White*, 10 Tex. 72; *Murless v. Franklin*, 1 Swanst. 17; *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Elliott v. Elliott*, 2 Ch. Cas. Ch. 231; *Grey v. Grey*, 2 Swanst. 597; *Sidmouth v. Sidmouth*, 2 Beav. 454; *Dyer v. Dyer*, 2 Cox, 93; *Christy v. Courtenay*, 13 Beav. 96; *Baker v. Leathers*, 3 Ind. 557; *Tremper v. Barton*, 18 Ohio, 418; *Cartwright v. Wise*, 14 Ill. 417; *Bennett v. Camp*, 54 Vt. 36; *Woodman v. Morrell*, 2 Freem. 33; *Graff v. Rohrer*, 35 Md. 327; *Jackson v. Matsdorf*, 11 Johns. 91; 6 Am. Dec. 355; *Whitten v. Whitten*, 3 Cush. 191; *Dudley v. Bosworth*, 10 Humph. 12; 51 Am. Dec. 690; *Thomas v. Chicago*, 55 Ill. 403; *Gray v. Gray*, 13 Neb. 453; *Bartlett v. Bartlett*, 13 Neb. 456; *Wheeler v. Kidder*, 105 Pa. St. 270; *Dummer v.*

general rule, that when a father purchases land and takes a deed to a child, it is *prima facie* an advancement to the child, the law presuming such to be the intention of the father. But this presumption may be rebutted, and wherever it expressly appears that the parent intended that the conveyance should not be considered such, then the child takes a trust estate."¹ This principle applies also where the child is an adopted one.² Where a title bond for land is executed to father and son upon the obligation of both for the purchase money, the son has an equitable estate in an undivided half of the land, which will be an advancement to him to that extent, if the whole of the purchase money is subsequently paid by the father.³ Any written acknowledgment by a son in whose name a deed has been taken for land purchased by the father will rebut the presumption that the conveyance was not intended as an advancement.⁴

Pitcher, 2 Mylne & K. 612; Garfield v. Hatmaker, 15 N. Y. 475; Johnson v. Johnson, 16 Minn. 512; Maxwell v. Maxwell, 109 Ill. 588; Kline's Appeal, 39 Pa. St. 463; Murphy v. Nathans, 46 Pa. St. 508; Wallace v. Bowens, 28 Vt. 638; Drew v. Martin, 32 Law J. Ch. 367; Jennings v. Selleck, 1 Vern. 467; Ebran v. Dancer, 2 Ch. Cas. Ch. 26; Tucker v. Burrow, 2 Hem. & M. 525; Benger v. Drew, 1 P. Wms. 780; Christ's Hospital v. Budgin, 2 Vern. 683; Glaister v. Hower, 8 Ves. 199; Kingdom v. Bridges, 2 Vern. 67; Jencks v. Alexander, 11 Paige, 619; Lady Gorges' Case, Cro. Car. 550; 2 Swanst. 600; Bedwell v. Froome, 2 Cox, 97; Back v. Andrew, 2 Vern. 120; Stevens v. Stevens, 70 Me. 92; Rumboll v. Rumboll, 2 Eden, 15, 17; Kilpin v. Kilpin, 1 Mylne & K. 556; Soar v. Foster, 4 Kay & J. 160; Beckford v. Beckford, Lofft, 490; Goodright v. Hodges, 1 Watk. Cop. 228; Mumma v. Mumma, 2 Vern. 19; Finch v. Finch, 15 Ves. 50; Wait v. Day, 4 Denio, 439; Proseus v. McIntyre, 5 Barb. 424; Reid v. Fitch, 11 Barb. 399; Fatheree v. Fletcher, 31 Miss. 265; Pole v. Pole, 1 Ves. 76; Partridge v. Havens, 10 Paige, 618; Page v. Page, 8 N. H. 187; Bodine v. Edwards, 10 Paige, 504; Astreen v. Flanagan, 3 Edw. Ch. 279; Frances v. Wilkinson, 147 Ill. 370; Scott v. Calladine, 79 Hun, 79.

¹ Fleming v. Donahoe, 5 Ohio, 255, 256. Where a father conveys land to the husband of his daughter in consideration of love and affection for her, no trust is created in favor of herself or her heirs: Higbee v. Higbee, 123 Mo. 287. See, also, Acker v. Priest, Iowa, 61 N. W. Rep. 235.

² Astreen v. Flanagan, 3 Edw. Ch. 279.

³ Thompson v. Thompson, 1 Yerg. (9 Tenn.) 97.

⁴ Shepherd v. White, 10 Tex. 72. Where a father had conveyed land

§ 1169. **Illustrations.**—A wife had a power of attorney from her husband by which she had authority to receive and collect all money and other property due to him for her own use. She received money under this power of attorney, and with it purchased land, taking the deed in her own name. After her husband's death, the heirs at law of the husband brought a bill in equity against her for a conveyance of the land so purchased, alleging these facts, and also that there was no intention on the part of the husband that such purchase should be a provision for the wife or her separate property. On demurrer to the bill it was held that the allegations mentioned did not show a resulting trust in favor of the husband or his heirs.¹ A and his wife conveyed a tract of land for the expressed consideration of one thousand dollars to B. On the next day B and wife reconveyed the same land for the same expressed consideration to A's wife. B prepared both these deeds at A's request for the purpose of conveying the land to A's wife. B also at the same time prepared a will which was properly executed by A's wife, devising this same land to her husband, A, for his natural life, and at his death to her son by a former marriage. She died before A. Four years after the execution of the

to one of his children, having been fraudulently induced to do so by representations that the child would hold it in trust for the other children, and subsequently executed another deed to the same child, in the entire absence of any fraud, it was held that such child, by virtue of the second deed, took the land free from any trust in favor of the other children: *Thompson v. Marley*, 102 Mich. 476; 60 N. W. Rep. 976.

¹ *Whitten v. Whitten*, 3 Cush. 191. Said Fletcher, J.: "The moral obligation of a parent to provide for his children is the foundation of this exception, or rather of this rebutter of a presumption, since it is not only natural, but reasonable, to presume that a parent, by purchasing in the name of a child, means a benefit to the latter in discharge of this moral obligation, and also as a token of parental affection: 2 Story's Eq., § 120. The like presumption exists in the case of a purchase by a husband in the name of his wife, and of securities taken in her name. Indeed, Mr. Justice Story says, that the presumption is stronger in the case of a wife than in that of a child. It is, therefore, an established doctrine, that where the husband pays for land conveyed to the wife, there is no resulting trust for the husband; but the purchase will be regarded and presumed to be an advancement and provision for the wife."

original deeds A died, leaving a will in which he declared that by B's mistake the deeds and will referred to did not carry out his intention, which he stated was to convey only a life estate to his wife, and he directed that proceedings be commenced to cancel the deeds. His executor and devisees brought a suit for this purpose alleging the mistake, and charging fraud and undue influence on A's wife and her son in procuring the deeds, and prayed that the deeds be set aside, and that the court declare a resulting trust in favor of A and his devisees. It was held that notwithstanding no consideration passed, there was no resulting trust in favor of A and his devisees, and that the declarations in A's will could not be received in evidence to show his intention in having the deeds made.¹ As a father who purchases land with his own money, and has the deed executed to his idiot son, cannot subsequently claim a resulting trust therein, and that he did not intend it for his son's benefit, but for his own use, so a purchaser of such land from the father occupies no better position than his grantor, and is not entitled to any relief in equity.²

§ 1170. **Parol agreement.**—Where land is purchased by a father, but by his direction, for the purpose of defrauding his creditors, a deed is made to his son, while the father has no resulting trust, yet the fact that he paid the whole of the purchase money constitutes a good moral or conscientious consideration for a subsequent parol agreement between the father and grantee, and another

¹ *Groff v. Rohrer*, 35 Md. 327. Where one who has paid for land causes the deed to be made to his brother, an intended gift is probable, and hence it does not necessarily follow that a trust will result: *Printup v. Patton*, 91 Ga. 422.

² *Cartwright v. Wise*, 14 Ill. 417. "The policy of the law," said the court, "requires that such an advancement thus made to such a party should be held to be irrevocable by the father. A contrary rule would open too wide a door for the revocation of advancements to those who have such a peculiar claim upon the bounty and protection of a father. The very idea of selecting an idiot for a trustee is absurd. He must be incapable of executing or discharging any duty in relation to it; and the very suggestion indicates insanity, or a contemplated fraud on the part of the father."

son for the partition of the land between the two sons; the grantee in the original deed will not be permitted to repudiate this agreement, and claim the whole land under his deed, where for several years the two sons have acted upon this agreement, and recognized the interest of each other in their respective divisions, and, in consequence of and reliance upon such agreement and division, have made expenditures.¹ Where a husband purchases land, and has the deed made to the wife for the sole purpose of providing a home for her in case she should survive him, his purpose being known by and assented to by her, and there being a mutual understanding between them that in the event he survived her, the title to the land should vest in him and should not descend to her heirs, no trust, it is held, arises in favor of the husband, although it was the intention of both husband and wife to have the proper instrument in writing prepared and executed for the purpose of effecting such understanding.²

§ 1171. **Where no obligation to provide exists.**—But the fact that a deed is made to some relative of the person paying the purchase money does not rebut the presumption of trust, where there is no obligation on the part of the person paying the money to provide for the grantee, as, if the deed be made to a brother,³ or to a sister.⁴ Where a woman cohabiting with a man to whom she has not been legally married, purchases land with her own money, and takes a deed in the name of the man, she is entitled to enforce a trust, as the parties are in law strangers to each other.⁵

¹ *Proseus v. McIntyre*, 5 Barb. 424.

² *Johnson v. Johnson*, 16 Minn. 512.

³ *Edwards v. Edwards*, 39 Pa. St. 369; *Maddison v. Andrew*, 1 Ves. 58; *Foster v. Foster*, 34 L. J. Ch. 428.

⁴ *Field v. Lonsdale*, 14 Jur. 995; *Keaton v. Cobb*, 1 Dev. Ch. 439; 18 Am. Dec. 595. And see as to other relations, *Edwards v. Field*, 3 Madd. 237; *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Jackson v. Feller*, 2 Wend. 465; *Taylor v. Alston*, 2 Cox, 97; *In re De Visme*, 2 De Gex & S. 17; *McGovern v. Knox*, 21 Ohio St. 547; 8 Am. Rep. 80; *Garrett v. Wilkin-*
son, 2 De Gex & S. 244.

⁵ *McDonald v. Carr*, 150 Ill. 204.

§ 1172. **Presumption rebuttable.**—While it is now an established principle, as has been shown, that where a deed has been taken in the name of an infant child, the presumption is, that the conveyance was intended as an advancement;¹ yet this presumption, however, may be rebutted by evidence of such facts as show that it was not the intention of the grantor to make an advancement. If the deed is made to the son by his procurement, without the knowledge or consent of the parent, the son cannot set up title to the land in himself as an advancement. If the deed, however, was made with the consent of the parent, the presumption of advancement may be rebutted by declarations of the parties, and by circumstances contemporaneous with the transaction.² It has been held that a bill by a husband to establish a

¹ *Murless v. Franklin*, 1 Swanst. 17; *Williams v. Williams*, 32 Beav. 370; *Grey v. Grey*, 2 Swanst. 600; *Redington v. Redington*, 3 Ridg. App. 190; *Kilpin v. Kilpin*, 1 Mylne & K. 542; *Mumma v. Mumma*, 2 Vern. 19; *Stileman v. Ashdown*, 2 Atk. 480; *Christy v. Courtney*, 13 Beav. 96; *Paschall v. Hinderer*, 28 Ohio St. 568; *Fox v. Fox*, 15 Irish Ch. 89; *Dyer v. Dyer*, 2 Cox, 98; *Collinson v. Collinson*, 3 De Gex, M. & G. 409; *Hayes v. Kingdom*, 1 Vern. 34; *Dummer v. Pitcher*, 2 Mylne & K. 272; *Skeats v. Skeats*, 2 Younge & C. Ch. 9; *Back v. Andrew*, 2 Vern. 120; *Taylor v. Taylor*, 1 Atk. 386; *Lloyd v. Read*, 1 P. Wms. 607; *Scroope v. Scroope*, 1 Ch. Cas. Ch. 27; *Finch v. Finch*, 15 Ves. 43; *Thompson v. Thompson*, 1 Yerg. 97. At one time it was considered that very slight circumstances would rebut this presumption. See *Elliott v. Elliott*, 2 Ch. Cas. Ch. 231; *Binion v. Stone*, 2 Freem. 169; *Dickinson v. Shaw*, 2 Cox, 95; *Rumboll v. Rumboll*, 2 Eden, 17; *Grey v. Grey*, 2 Swanst. 601; *Lloyd v. Read*, 1 P. Wms. 608; *Finch v. Finch*, 15 Ves. 43; *Pole v. Pole*, 1 Ves. 76; *Murless v. Franklin*, 1 Swanst. 13. But such is not the view now taken.

² *Peer v. Peer*, 3 Stockt. Ch. 432. And the presumption as to an advancement may be rebutted or supported by evidence of antecedent or contemporaneous facts: *Williams v. Williams*, 32 Beav. 370; *Persons v. Persons*: 25 N. J. Eq. 250; *Taylor v. Taylor*, 4 Gilm. 303; *Dudley v. Bosworth*, 10 Humph. 12; 51 Am. Dec. 690; *Butler v. M. Ins. Co.*, 14 Ala. 777; *Christy v. Courtney*, 13 Beav. 96; *Tucker v. Burrow*, 2 Hem. & M. 524; *Hayes v. Kindersley*, 2 Smale & G. 194; *Shales v. Shales*, 2 Freem. 252; *Baker v. Leathers*, 3 Ind. 558; *Reddington v. Reddington*, 3 Ridg. App. 177; *Hall v. Hall*, 1 Con. & L. 120; *Jackson v. Matsdorf*, 11 Johns. 91; 6 Am. Dec. 355. And see *Stone v. Stone*, 3 Jur., N. S., 708; *Devoy v. Devoy*, 3 Smale & G. 403; *Hubble v. Osborne*, 31 Ind. 249; *Williams v. Williams*, 32 Beav. 372; *Tremper v. Barton*, 13 Ohio, 418.

resulting trust in land bought by his wife with money furnished by him, stating that he sent her the money from a foreign country, with instructions to purchase the premises and have the deed made to her, so that in case of death or accident to him while abroad she and her children might have a home, but that she was only a nominal purchaser, acting really as his agent, and that the property was bought for and belonged to him, and was considered by them as his and not hers, and that she made no claim to it, and that it was not his intention that she should have any beneficial interest except as his trustee, does not contain sufficient averments to show a resulting trust.¹ If the deed is made to a wife or child for the purpose of defrauding creditors, a trust arises which the creditors can enforce.²

§ 1173. Married woman as agent of husband.—If a deed is made to one who pays no part of the purchase money, the purchase price being paid by a married woman as agent of her husband, and the grantee named in the deed gives her a receipt for the money, and also executes and delivers to her a written promise to convey to her on demand the land described in the deed, and the parties always treat the property as belonging to the husband, the grantee holds such land in trust for the husband. After the death of the husband intestate he may relieve himself from his trust by conveying the land to

¹ *Cairns v. Colburn*, 104 Mass. 274. See *Cartwright v. Wise*, 14 Ill. 417. See, also, *Williard v. Williard*, 56 Pa. St. 119; *Jeans v. Cook*, 24 Beav. 521; *Pole v. Pole*, 1 Ves. 76.

² *Lush v. Wilkinson*, 5 Ves. 384; *Rucker v. Abell*, 8 Mon. B. 566; 48 Am. Dec. 406; *Townsend v. Westacott*, 2 Beav. 340; *Newell v. Morgan*, 2 Harris, 225; *Stileman v. Ashdown*, 2 Atk. 477; *Christ's Hospital v. Budgin*, 2 Vern. 684; *Doyle v. Sleeper*, 1 Dana, 531; *Elliott v. Horn*, 10 Ala. 348; 44 Am. Dec. 488; *McCartney v. Bostwick*, 32 N. Y. 53; *Creed v. Lancaster Bank*, 1 Ohio St. 1; *Abney v. Kingsland*, 10 Ala. 355; 44 Am. Dec. 491; *Guthrie v. Gardner*, 19 Wend. 414; *Crozier v. Young*, 3 Mon. 158; *Jencks v. Alexander*, 11 Paige, 619; *Demaree v. Driskill*, 3 Blackf. 115; *Gowing v. Rich*, 1 Ired. 553; *Watson v. Le Row*, 6 Barb. 487; *Cutter v. Griswold*, Walk. Ch. 437; *Kimmel v. McRight*, 2 Pa. St. 38; *Bell v. Hallenback*, Wright, 751; *Parish v. Rhodes*, Wright, 339.

the heirs at law of the husband, and the fact that one object of having the deed made to the grantee was to protect the land from attachment by the creditors of the husband is immaterial.¹ If land is purchased by a son with his own money on the understanding that the deed is to be made to him, but through mistake the deed is made to the father, the latter holds the legal title to the land in trust for the son, and if he conveys the property to the son, the conveyance cannot be deemed fraudulent.²

§ 1174. **Payment of purchase money by alien.**—If the law forbids an alien to hold land, he cannot do indirectly what the law will not permit him to do directly. Hence, if he pays the purchase money, but the deed is taken in the name of a stranger, no resulting trust arises.³ “A resulting trust is the creature of equity. It is raised for the benefit of the party who, upon principles of justice and the circumstances of the case, is entitled to the subject. Being raised for his benefit, there can be no motion for raising it, when that will pervert it to his prejudice. That which is designed as a boon will not be changed into a forfeiture. To raise the trust, and thereby forfeit the estate, would be to commit the offense and make the alien bear the penalty.”⁴ But where an attorney employed by

¹ *Perkins v. Nichols*, 11 Allen, 542. See *Persons v. Persons*, 25 N. J. Eq. 250; *Peer v. Peer*, 3 Stockt. Ch. 432; *Higgins v. Higgins*, 13 Abb. N. C. 13.

² *Fairhurst v. Lewis*, 23 Ark. 435.

³ *Phillips v. Crammond*, 2 Wash. C. C. 441; *Hubbard v. Goodwin*, 3 Leigh, 492; *Taylor v. Benham*, 5 How. 233, 270; *Leggett v. Dubois*, 5 Paige, 114; 28 Am. Dec. 413; *Phillpotts v. Phillpotts*, 10 Com. B. 85; *Farley v. Shippen*, Wythe, 139; *Childers v. Childers*, 1 De Gex & J. 482. No resulting trust can arise when contrary to policy of the law, or to some express law: *Ford v. Lewis*, 10 Mon. B. 127; *Cutler v. Tuttle*, 19 N. J. Eq. 562; *Groves v. Groves*, 3 Younge & J. 163; *Redington v. Redington*, 3 Ridg. App. 181; *Ex parte Yallop*, 15 Ves. 67; *Camden v. Anderson*, 5 Term Rep. 709; *Ex parte Houghton*, 17 Ves. 251; *Proseus v. McIntyre*, 5 Barb. 424.

⁴ *Hubbard v. Goodwin*, 3 Leigh, 492, 512, per Tucker, P. To the same effect are the dicta of the Chancellor in *Leggett v. Du Bois*, 5 Paige, 114, 118; 28 Am. Dec. 413: “The law will never cast the legal or equitable estate upon a person who has no right to hold it, although an estate

a firm composed of aliens, to collect a debt due to the firm, compromised the indebtedness by taking land in payment, but on account of the alienage of the partners took the deed for the land in his own name, without any directions from them, so that he might sell the land and convert it into money, and informed them by letter of what had been done, and promised to sell the land as soon as possible, but died before a sale had been effected, and his heirs sold the land after his death, acting on the belief that the land was theirs, it was held that the proceeds of sale such were personal property belonging to the partnership.¹ But if the disability is removed the alien may enforce the trust. The naturalization has a retroactive effect.²

§ 1175. Payment when title passes.—A resulting trust is never created by the agreement of the parties, but always by implication of law, independently of any agreement.³ In order to create a resulting trust, the money must have been advanced and invested at the time the purchase is made. The trust arises from the execution of the deed and conveyance of title, and the parties

may, by an express contract or conveyance, be vested in an alien, until office found, for the benefit of the people of the State. Where an alien, therefore, purchases land and takes an absolute conveyance in the name of the citizen, without any agreement or declaration of a trust, the law will not raise a trust in favor of the alien purchaser who cannot hold the land, any more than it would cast it by descent upon an alien heir who cannot hold it against the State. The result in such a case must be, either that the nominal grantee takes the land, discharged of any trust by mere implication of law, or that there is a resulting trust in behalf of the people of the State, which they alone can enforce against the grantee in the deed."

Where a slave purchased land with the assent of his master and the deed was made to a free person, and the slave afterward obtained his freedom, it was held that a resulting trust in his favor might be enforced: *Leiper v. Hoffman*, 26 Miss. 615.

¹ *Anstice v. Brown*, 6 Paige, 448. See *McCaw v. Galbraith*, 7 Rich. 74.

² *Jackson v. Beach*, 1 Johns. Cas. 399; *Osterman v. Baldwin*, 6 Wall. 116.

³ *Sheldon v. Harding*, 44 Ill. 68.

must be in such a situation that a trust will arise from the transaction itself the instant at which the title passes.¹ A resulting trust cannot be established by evidence that the grantee made an oral promise to convey the land to one whenever the latter should repay to the grantee, with interest, the money advanced for the purchase, when no valid consideration for such promise appears, and it is not shown that any part of the purchase money was the money of the party seeking to enforce a trust.² An oral agreement for the purchase of two parcels of land on joint account was made between two parties, A and B. By this agreement, A was to pay eight-tenths of the purchase price of the first parcel by conveying to the owner land belonging to him, and B was to pay the remaining two-tenths. The excess of three-tenths over A's half paid by him, it was agreed, should be applied toward his share of the price to be paid for the second parcel. The title to the first parcel was taken in the name of both jointly, and A conveyed his land to the grantor as he had agreed. Subsequently B bought the second parcel with his own money, and took the deed for it in his own name. From these facts, no resulting trust, the court held, arose in

¹ *Buck v. Swazey*, 35 Me. 41; 56 Am. Dec. 681; *Case v. Coddington*, 38 Cal. 191, 193; *Barnard v. Jewell*, 97 Mass. 87; *Kendall v. Mann*, 11 Allen, 15; *Hunt v. Friedman*, 63 Cal. 510; *Miller v. Blose*, 30 Gratt. 744; *Williard v. Williard*, 56 Pa. St. 119; *McClure v. Doak*, 6 Baxt. (Tenn.) 364; *Tunnard v. Littell*, 23 N. J. Eq. 264; *Davis v. Wetherell*, 11 Allen, 19; *Forsythe v. Clark*, 3 Wend. 657; *White v. Carpenter*, 2 Paige, 218; *Rhea v. Tucker*, 56 Ala. 450; *Wheeler v. Kirtland*, 23 N. J. Eq. 13; *Nixon's Appeal*, 63 Pa. St. 279; *Pinnock v. Clough*, 16 Vt. 500; 42 Am. Dec. 521; *Botsford v. Burr*, 2 Johns. Ch. 408; *Cross's Appeal*, 97 Pa. St. 471; *Steere v. Steere*, 5 Johns. Ch. 1; 9 Am. Dec. 256; *Graves v. Dugan*, 6 Dana, 331; *Kelly v. Johnson*, 28 Mo. 249; *Jackson v. Moore*, 6 Cow. 706; *McGowen v. McGowen*, 14 Gray, 119; 74 Am. Dec. 668; *Page v. Page*, 8 N. H. 187; *Du Val v. Marshall*, 3 Ark. 230; *Gerry v. Stimson*, 60 Me. 186; *Fickett v. Durham*, 109 Mass. 419; *Taliaferro v. Taliaferro*, 6 Ala. 404; *Wallace v. Marshall*, 9 Mon. B. 148; *Gee v. Gee*, 2 Sneed, 395; *Connor v. Lewis*, 16 Me. 268; *Rogers v. Murray*, 3 Paige, 390; *Freeman v. Kelly*, 1 Hoff. Ch. 90; *Dudley v. Batchelder*, 53 Me. 403; *Foster v. Trustees, etc.*, 3 Ala. 302.

² *Barnard v. Jewett*, 97 Mass. 87.

favor of A in the second parcel.¹ Where a deed absolute in form is made, expressing no trust, but the conveyance is intended to be in trust for the grantor and his wife, no resulting trust arises from the subsequent payment of money by the grantor's children.² But the acceptance of a promissory note by the grantor instead of money, may, under some circumstances, be regarded as a payment.³ In the case just cited, A purchased a tract of land and caused it to be conveyed to B, who signed a note with him as surety for the purchase money. Subsequently, A assigned his interest to C, as trustee, for the benefit of A's creditors. Still later, B not being satisfied, A requested D to take a deed of the land and hold it for A, and to pay B the amount of his lien. This was done, and C afterward brought a suit to compel D to convey to him the land, tendering to him the amounts of his, D's, payments to B, with interest. The court held that the resulting trust with which the land was chargeable in favor of A inured also to the benefit of C.⁴ Where a husband procures his wife to join with him in a mortgage of her land, under an oral agreement that if the land was sold to pay the debt, the husband should convey to his wife his land, and subsequently the mortgaged premises were sold, the wife joining in the deed, and from the proceeds the mortgage debts and other debts of the husband were paid, and, on the same day, the premises were sold, the husband in pursuance of his oral agreement conveyed his land to a trustee for his wife's use, but the trust deed was registered after the levy of an execution upon the land by a creditor of the husband, it was held that the lien of the execution was superior to the rights of the wife under the conveyance.⁵

¹ Fickett v. Durham, 109 Mass. 422. Said Ames, J: "The defendant buys the estate with his own funds, and upon his own credit, and although it may be that *ex æquo et bono*, he ought to allow the plaintiff to share in the advantages of the purchase, we think the court cannot compel him to do so upon this bill, without exceeding its jurisdiction."

² Gerry v. Stimson, 60 Me. 186.

³ Buck v. Pike, 11 Me. 9.

⁴ Buck v. Pike, 11 Me. 9.

⁵ McClure v. Doak, 6 Baxt. (Tenn.) 364.

§ 1176. **Gift or loan to cestui que trust.**—If the party supplying the purchase money intends it as a gift or a loan to the *cestui que trust*, this is sufficient to raise a resulting trust. It is not necessary that the money advanced should come directly from the *cestui que trust*.¹ Where a minor makes the first payment for the purchase of a tract of land according to the terms of the purchase, and is willing to give notes and a mortgage on the property for the balance due, but the vendor, for the purpose of avoiding the question of the vendee's minority, executes a deed to the mother of such minor, and takes her notes and mortgage, with the understanding between all the parties concerned in the transaction that the minor son is to pay the notes, and he pays the annual interest on the notes, improves the land, and pays the notes at their maturity, though such payment is made subsequently to the mother's death, a resulting trust arises in his favor, and he is entitled to a decree conveying the legal title of the heirs of the grantee to him.²

§ 1177. **Agreement to convey to another.**—As the party claiming the benefit of a resulting trust must, at the time the purchase is made, have paid some part of the purchase money, it follows that if one party buys the land, paying his own money for it, and taking the deed in his own name, the fact that he had made an agreement that another party might purchase from him will not convert the transaction into a resulting trust.³ An allegation of a verbal agreement that one party was to be jointly interested with another in a purchase, is insufficient to show a resulting trust, in the absence of any allegation that

¹ Kelly v. Johnson, 28 Mo. 249; Dudley v. Batchelder, 53 Me. 403.

² Fleming v. McHaile, 47 Ill. 282. And see Morey v. Herrick, 18 Pa. St. 123; Cutter v. Tuttle, 19 N. J. Eq. 562; Lounsbury v. Purdy, 18 N. Y. 515; Aveling v. Knipe, 19 Ves. 441; Page v. Page, 8 N. H. 187; Runnells v. Jackson, 1 How. (Miss.) 358; Honore v. Hutchings, 8 Bush, 687. And see, also, Gibson v. Foote, 40 Miss. 788; Orop v. Norton, 9 Mod. 235; White v. Carpenter, 2 Paige, 217; Henderson v. Hoke, 1 Dev. & B. Ch. 119.

³ Reeve v. Strawn, 14 Ill. 94. See McCue v. Gallagher, 23 Cal. 51.

the former paid any portion of the consideration at the time at which the purchase was made.¹ Where a guardian of minor children purchased a tract of land which, at one time the father of the children owned, on the representation to the vendor that he, the guardian, desired to secure the land for the children, but took the deed in his own name, and paid his own money to the vendor, it was held that no express trust would arise in favor of the children, for as the representations made by the guardian were by parol, such a trust was within the prohibition of the statute of frauds.² Nor would the law in such a case, imply a trust because the children for whose benefit the guardian pretended that he desired to purchase the land had no interest or claim or expectation of interest in the land, the title to which, though once vested in the father of the minors, had been transferred to another.³ Where a father purchased land, the deed being executed to himself, and paid the purchase price with the exception of a small amount which was paid by his son, and it was understood that the son should have the land, and he took possession of it and erected improvements, the father speaking of the land as that of the son, and saying that he would convey or devise it to him, but died without doing so, a trust does not result to the son by reason of his payment of the small part of the consideration, in the absence of evidence that the deed was made to the father without the son's consent.⁴ Where A borrowed money from B with which to buy land, B reserving an option to take an interest, but declining to become interested in the title at the time, and did not give A notice of his intention to take an interest or offer to pay any money beyond the loan made to A, but waited till the transaction proved to be a

¹ *Roberts v. Ware*, 40 Cal. 634. See *White v. Sheldon*, 4 Nev. 280. And see *Russell v. Allen*, 10 Paige, 249. But see *Towle v. Wadsworth*, 147 Ill. 80.

² *Rogers v. Simmons*, 55 Ill. 76.

³ *Rogers v. Simmons*, 55 Ill. 76.

⁴ *Thorne v. Thorne*, 18 Ind. 462.

profitable one, when he sought to establish a trust in A for his benefit, it was held that he could not do so.¹ A deed was made to a son in law which stated the consideration to be his marriage, and the natural love and affection that the grantor had for his daughter and the grantee. The deed stated, after the consideration clause, that the grantor made the conveyance for the purpose of advancing the grantee in life. No trust in the land conveyed, the court held, arose in favor of the daughter.²

§ 1178. **Resulting trust not converted into express trust by agreement.**—The fact that the grantee agrees verbally with the party paying the consideration, that the former would, upon demand, execute a deed to the latter, does not make the trust express, as distinguished from one implied, so as to exclude parol proof.³ Where a husband purchases real estate, and has the deed therefor made to his wife, under an express agreement between them that she shall, at his request, convey to him the land to which she thus holds the legal title, she has no interest which, in the event of her death while holding the legal title, will, as against the husband, descend to her heirs.⁴ “It cannot be that the consent of the trustee to hold the title for the benefit of the *cestui que trust*, or an agreement so to do, in case of a resulting trust, will change its character. By the agreement the trustee simply assents to an obligation imposed by the law; the trust would exist without the agreement by operation of law. The agreement cannot destroy the effect of the conditions

¹ Loomis v. Loomis, 28 Ill. 454. And see Kisler v. Kisler, 2 Watts, 323; 27 Am. Dec. 308; Duffy v. Masterson, 44 N. Y. 557; Williard v. Williard, 56 Pa. St. 119; Green v. Cook, 2 Ill. 196; Dorsey v. Clark, 4 Har. & J. 551; Jackson v. Ringland, 4 Watts & S. 149; Walker v. Brungard, 13 Smedes & M. 723; Peebles v. Reading, 8 Serg. & R. 484; Ensley v. Ballentine, 4 Humph. 233; Lathrop v. Hoyt, 7 Barb. 60; Sample v. Coulson, 9 Watts & S. 62; Smith v. Smith, 27 Pa. St. 180.

² Thompson v. Thompson, 18 Ohio St. 73.

³ Bayles v. Baxter, 22 Cal. 575.

⁴ Cotton v. Wood, 25 Iowa, 43, and cases cited.

under which the law presumes the estate is held by the trustee.”¹

§ 1179. Part payment under agreement to convey.—While evidence of a parol agreement by one to purchase land for another is inadmissible where the former has paid the whole of the purchase money and taken the deed in his own name, yet if the party claiming the benefit of the trust has paid any portion of the purchase money at the time of the execution of the deed, it is competent to prove a verbal agreement which will have the effect to deprive the grantee of all beneficial interest in the land, and to charge the premises with a trust in favor of the one for whom the grantee agreed to purchase it.²

§ 1180. Advancing portion of money.—Where a bargain is made between the owner and another for the purchase of a tract of land, with the knowledge of a third person who stands by and becomes a party to the transaction, by advancing a part of the money so as to enable the vendee to complete the bargain, such third person, if he subsequently, without the vendee’s knowledge, purchases from the vendor a portion of the same land, for which he receives a deed, and which is placed on record before the deed to the first vendee, holds the title in trust for such first vendee.³ And the person who has, under these circumstances, advanced a part of the money, if he sells the land to a *bona fide* purchaser without notice, becomes liable for the damage sustained.⁴

§ 1181. Agreement to purchase by two or more parties.—Where two or more persons have agreed among themselves to purchase a tract of land, but one of the number pays the whole of the purchase price, and has the deed made out in his favor, the others cannot claim a

¹ *Cotton v. Wood*, 25 Iowa, 43, 46, per Beck, J.

² *Hidden v. Jordan*, 21 Cal. 92. See *Meason v. Kaine*, 63 Pa. St. 335.

³ *Mercier v. Hemme*, 50 Cal. 606.

⁴ *Mercier v. Hemme*, 50 Cal. 606.

resulting trust.¹ But where A purchased a piece of real estate, paid a part of the consideration, and had the deeds made to B, his brother, who executed a mortgage to secure the balance of the purchase money remaining unpaid, and subsequently buildings were erected upon the land, to which B contributed his personal attention and money, and afterward A signed a document acknowledging that he had received from B, in settlement of accounts, three mortgages on the premises, which mortgages, however, were never recorded or paid, but were returned to B and destroyed, it was held that these circumstances created a resulting trust in A's favor, and that any declarations that he had purchased for B must, in order to bind him, have been made contemporaneously with the purchase, and that this resulting trust was not divested by the receipt for the valueless mortgages given by A some months after the erection of the buildings.² A party uniting with others to purchase land, and agreeing to conduct the negotiations, and to buy the land for the lowest price possible, is bound, from the position of trust which he has assumed, to exercise good faith toward his associates, and must share with them all the profits of the transaction.³

§ 1182. Parol evidence to establish trust.—The provisions of the statute of frauds apply only to trusts created by agreement of the parties, and do not apply to such trusts as the law implies by reason of the situation or probable intent of the parties.⁴ Parol evidence, there-

¹ *Coppage v. Barnett*, 34 Miss. 621; *Brooks v. Fowle*, 14 N. H. 248; *Fowke v. Slaughter*, 3 Marsh. A. K. 56; 13 Am. Dec. 133; *Butler v. Rutledge*, 2 Cold. 4; *Edwards v. Edwards*, 39 Pa. St. 369. See *Cook v. Brough*, 8 Eng. 183. But see *Leggett v. Leggett*, 88 N. C. 108.

² *Edwards v. Edwards*, 39 Pa. St. 369.

³ *King v. Wise*, 43 Cal. 629.

⁴ *Smith v. Sackett*, 5 Gilm. 544; *Ward v. Armstrong*, 84 Ill. 151; *Foot v. Bryant*, 47 N. Y. 544; *Black v. Black*, 4 Pick. 234; *Byrant v. Hendricks*, 5 Iowa, 256; *Ross v. Hegeman*, 2 Edw. Ch. 373; *Judd v. Hasely*, 22 Iowa, 428; *Larkin v. Rhodes*, 5 Port. 196; *Scheerer v. Scheerer*, 109 Ill. 11; *Summers v. Moore*, 113 N. C. 394; *Jordan v. Garner*, 101 Ala. 411; *Gates v. Card*, 93 Tenn. 234; *Myers v. Jackson*, 135 Ind. 136; *How-*

fore, is admissible to show the facts from which a resulting trust will arise.¹ Where the owner of the legal title has agreed to convey it upon the perform-

ard *v.* Howard, 52 Kan. 469; Plumb *v.* Cooper, 121 Mo. 268; Snider *v.* Johnson, 25 Or. 328; Frances *v.* Rhoades, 146 Ill. 635; Cooksey *v.* Bryan, 2 App. D. C. 557. The existence of a parol contract under which a person was to buy land and hold it for the joint benefit of himself and another, may be established by the evidence of the *cestui que trust*, and by the admission of the trustee that his original intention was to purchase for their joint benefit, but that he changed his mind before the purchase without notifying the *cestui que trust* of the alteration in his intention: Towle *v.* Wadsworth, 147 Ill. 80.

¹ Foote *v.* Bryant, 47 N. Y. 544; Kane *v.* O'Connors, 78 Va. 76; Caldwell *v.* Caldwell, 7 Bush, 515; Verplank *v.* Caines, 1 Johns. Ch. 57; Livermore *v.* Aldrich, 5 Cush. 431; Elliott *v.* Armstrong, 3 Blackf. 199; Boyd *v.* McLean, 1 Johns. Ch. 582; Pritchard *v.* Brown, 4 N. H. 397; 17 Am. Dec. 431; Knox *v.* McFarren, 4 Cal. 586; Murry *v.* Sell, 23 W. Va. 475; Page *v.* Page, 8 N. H. 187; Witts *v.* Horney, 59 Md. 584; Botsford *v.* Burr, 2 Johns. Ch. 405; Morgan *v.* Clayton, 61 Ill. 35; Cooth *v.* Jackson, 6 Ves. 39; Pugh *v.* Bell, 1 Marsh. J. J. 399; Swinburne *v.* Swinburne, 28 N. Y. 568; Hunter *v.* Town of Marlboro, 2 Wood. & M. 168; Larkins *v.* Rhodes, 5 Port. 196; Moore *v.* Moore, 38 N. H. 382; Hanson *v.* First Presbyterian Church, 1 Stockt. Ch. 441; Olive *v.* Dougherty, 5 Iowa, 393; Boyd *v.* McLean, 1 Johns. Ch. 582; Miller *v.* Stokely, 5 Ohio St. 194; Farringer *v.* Ramsey, 2 Md. 365; Paine *v.* Wilcox, 16 Wis. 202; Cotton *v.* Wood, 25 Iowa, 43; Lipscomb *v.* Nichols, 6 Colo. 290; Baker *v.* Vining, 30 Me. 121; 50 Am. Dec. 617; Letcher *v.* Letcher, 4 Marsh. J. J. 590; Parmlee *v.* Sloan, 37 Ind. 469; Greer *v.* Baughman, 13 Md. 257; Vandever *v.* Freeman, 20 Tex. 333; 70 Am. Dec. 391; Clarke *v.* Quackenboss, 27 Ill. 260; Stall *v.* Cincinnati, 16 Ohio St. 169; Phelps *v.* Seeley, 22 Gratt. 573; Childs *v.* Griswold, 19 Iowa, 362; Shepard *v.* Pratt, 32 Iowa, 296; Hyden *v.* Hyden, 6 Baxt. (Tenn.) 406; Blyholder *v.* Gibson, 18 Pa. St. 134; Strimpfner *v.* Roberts, 18 Pa. St. 283; 57 Am. Dec. 606; Mitchell *v.* O'Neale, 4 Nev. 504; Baumgartner *v.* Guessfield, 38 Mo. 36; Farrell *v.* Lloyd, 69 Pa. St. 239; Willis *v.* Willis, 2 Atk. 71; Heiskell *v.* Powell, 23 W. Va. 717; Scoby *v.* Blanchard, 3 N. H. 170; Powell *v.* Bronson etc. Mfg. Co., 3 Mason, 347; Jennison *v.* Graves, 3 Blackf. 441; Snelling *v.* Utterback, 1 Bibb. 609; 4 Am. Dec. 661; Byers *v.* Wackman, 16 Ohio, 440; Faris *v.* Dunn, 7 Bush, 276; Blair *v.* Bass, 4 Blackf. 540; Peiffer *v.* Lytle, 58 Pa. St. 386; McGinity *v.* McGinity, 6 Pa. St. 38; Nixon's Appeal, 63 Pa. St. 279; Bayles *v.* Baxter, 22 Cal. 575; Malin *v.* Malin, 1 Wend. 626; Peabody *v.* Tarbell, 2 Cush. 226; Lloyd *v.* Carter, 17 Pa. St. 216; Dismukes *v.* Terry, Walk. Ch. 197; Millard *v.* Hathaway, 27 Cal. 119; Smith *v.* Burnham, 3 Sum. 438; Barron *v.* Barron, 24 Vt. 375; Lyford *v.* Thurston, 16 N. H. 399; Cooper *v.* Skeel, 14 Iowa, 578; Groves *v.* Groves, 3 Younge & J. 163; Bartlett *v.* Pickersgill, 1 Eden, 515; Lench *v.* Lench, 10 Ves. 517; Harder *v.* Harder, 2 Sand. Ch. 17; Peebles *v.* Reading, 8 Serg. & R. 484. See Osborne *v.* Endicott, 6 Cal. 149; 65 Am. Dec. 498. In some of the early cases it

ance of certain conditions, and does convey it at the purchaser's request, for his benefit, to a third person, this may be evidence of payment by the beneficiary, so as to raise a resulting trust, which may be taken by his creditors.¹ For the purpose of establishing the trust, evidence that the person who paid the State for a warrant was a clerk in the land-office, had but a small amount of property, and had paid large sums for a great number of warrants to which he never asserted any claim, is admissible.² But the character of the transaction cannot be shown by agreements and letters between the party paying the purchase money and other parties.³ But the admissions of the grantee are admissible for the purpose of proving who the person is, by whom the purchase money was paid.⁴ A jury are authorized to find that a father holds land in trust, where it is shown that he had not sufficient means, that the son had, that the father at about the time he left home said that he was going to a certain place near which the land was situated for the purpose of buying land for the son, that the latter then delivered money to the father, and that this occurred about the time the land was bought.⁵

§ 1183. Convincing proof required.—As it is sought in attempting to establish a resulting trust to raise an equity superior to the deed, and thus give it an effect not apparent upon its face, the proof that one other than the grantee is beneficially interested must be clear and con-

was held that parol evidence could not be received to control the recitals of the deed as to the payment of the consideration: See *Kirk v. Webb*, Prec. Ch. 84; *Hooper v. Eyles*, 2 Vern. 480; *Deg v. Deg*, 2 P. Wms. 414; *Heron v. Heron*, Prec. Ch. 163; *Cox v. Bateman*, 2 Ves. 19; *Skitt v. Whitmore*, Freem. 280; *Ambrose v. Ambrose*, 1 P. Wms. 321; *Kinder v. Miller*, Prec. Ch. 172; *Newton v. Preston*, Prec. Ch. 103. And see *Barbin v. Gaspard*, 15 La. Ann. 539; *Groesbeck v. Seeley*, 13 Mich. 329; *Connor v. Foilansbee*, 59 N. H. 124.

¹ *Lyford v. Thurston*, 16 N. H. 399.

² *Strimpfler v. Roberts*, 18 Pa. St. 283; 57 Am. Dec. 606.

³ *Strimpfler v. Roberts*, 18 Pa. St. 283; 57 Am. Dec. 606.

⁴ *Baumgartner v. Guessfeld*, 38 Mo. 36.

⁵ *Farrell v. Lloyd*, 69 Pa. St. 239.

vincing. "We recognize the doctrine to the fullest extent, and such is the uniform holding in all the cases, that where a right or title is claimed against a writing, in this or any other class of cases, where it is permitted at all, it must be sustained by proof of the most convincing and irrefragable character. The courts have been deeply impressed with the danger of this kind of proof, as tending to perjury and the insecurity of paper titles. Kent and other eminent judges regret that the doctrine was ever introduced, as it opens a wide door to frauds and perjuries, which the statute was intended to close. It has, therefore, been uniformly required, in this class of cases, that the payment of the money of the person who claims to be a *cestui que trust* should be clearly proved. The same rule as to quantity and sufficiency of proof applies in this case as in a bill filed to convert a sale or deed, apparently absolute, into a mortgage or conditional sale."¹ Expressions of a similar character may be found in numerous other cases. "While parol proof is admissible to establish a trust of this sort, it is important to understand that such proof must be strong and convincing."² It is said, "the authorities are clear that the payment of the purchase money by the *cestui que trust* must be clearly proved, otherwise you render insecure titles depending on deeds and other written documents."³ "The cases uniformly show," says Chancellor Kent, "that the courts have been deeply impressed with the danger of this kind of proof, as tending to perjury and the insecurity of paper title; and they have required the payment by the *cestui que trust* to be clearly

¹ *McCammon v. Pettitt*, 35 Tenn. (3 Sneed) 242, 246, per Caruthers, J; *Pillar v. McConnell*, 141 Ind. 670; 40 N. E. Rep. 689; *Reed v. Painter*; 129 Mo. 674; 31 S. W. Rep. 919; *Hogeboom v. Robertson*, 41 Neb. 795; *McRae v. McRae*, 78 Md. 270; *Bourke v. Callanan*, 160 Mass. 195; *Koster v. Miller*, 149 Ill. 195; *Hensler v. Hensler*, 5 Tex. Civ. App. 367. The fact of payment by the beneficiary, it is said, must be proven beyond a reasonable doubt: *Logan v. Johnson*, 72 Miss. 185; 16 So. Rep. 231.

² *Thomas v. Standiford*, 49 Md. 181, 184.

³ *Dorsey v. Clarke*, 4 Har. & J. 551, 557, per Dorsey, J.

proved.”¹ “This rule is based on the soundest legal principles, for the parol proof must of necessity be the testimony of witnesses as to what the parties have said or verbally agreed to—a class of testimony notoriously weak; and the fact to be overturned is a writing, the best evidence as to where the legal title is.”²

§ 1184. **Parol evidence to rebut resulting trust.**—It is hardly necessary to remark that it is proper to rebut any presumption that may arise from the transaction as to a resulting trust by parol evidence.³ Where A contracts for the purchase of real estate, pays the purchase money, but subsequently consents by parol that the deed should be made by the owner to B in consideration of the latter assuming certain liabilities for A, the deed, when made, is to be regarded as the deed of A himself. B acquires the title, and may rebut by parol evidence any equity claimed by A.⁴ And the same result follows where

¹ *Boyd v. McLean*, 1 Johns. Ch. 582, 590.

² *Hyden v. Hyden*, 6 Baxt. (Tenn.) 406, 407, per Freeman, J. See, also, *Faringer v. Ramsay*, 2 Md. 375; *Sidle v. Walter*, 5 Watts, 389; *Lench v. Lench*, 10 Ves. 517; *Greer v. Baughman*, 13 Md. 257; *Keller v. Keller*, 45 Md. 269; *Brawner v. Staup*, 21 Md. 328; *Slocumb v. Marshall*, 2 Wash. C. C. 397; *Cottingham v. Fletcher*, 2 Atk. 155; *Newton v. Preston*, Prec. Ch. 103; *Enos v. Hunter*, 4 Gilm. 211; *Millard v. Hathaway*, 27 Cal. 119; *O'Hara v. O'Neil*, 2 Eq. Cas. Abr. 475; *Carey v. Callan*, 6 Mon. B. 44; *Ambrose v. Ambrose*, 1 P. Wms. 321; *Nelson v. Warrall*, 20 Iowa, 469; *Laughlin v. Mitchell*, 14 Fed. Rep. 382.

³ *Elliott v. Armstrong*, 2 Blackf. 199; *Tryon v. Huntoon*, 67 Cal. 325; *Bayles v. Baxter*, 22 Cal. 575; *Garrick v. Taylor*, 29 Beav. 79; *Sewell v. Baxter*, 2 Md. Ch. 448; *Squire v. Harder*, 1 Paige, 494; 19 Am. Dec. 446; *Hays v. Quay*, 68 Pa. St. 263; *McCue v. Gallagher*, 23 Cal. 51; *White v. Carpenter*, 2 Paige, 217; *Byers v. Danley*, 27 Ark. 77; *Rider v. Kidder*, 10 Ves. 364; *Benbow v. Townsend*, 1 Mylne & K. 506; *Jackson v. Morse*, 16 Johns. 199; 8 Am. Dec. 306; *Creed v. Lancaster Bank*, 1 Ohio St. 1; *Bellasis v. Compton*, 2 Vern. 294; *Pinney v. Fellows*, 15 Vt. 525; *Steere v. Steere*, 5 Johns. Ch. 18; 9 Am. Dec. 256; *Baker v. Vining*, 30 Me. 126; 50 Am. Dec. 617; *Rundle v. Rundle*, 2 Vern. 252; *Lane v. Dighton*, Amb. 409; *Beecher v. Major*, 2 Drew. & S. 431; *Jackson v. Feller*, 2 Wend. 465; *Taylor v. Taylor*, 1 Atk. 386.

⁴ *Myers v. Myers*, 25 Pa. St. 100. “Such evidence,” said the court, “is in support of the written title, and not in opposition to it.” See, also, *Jackson v. Morse*, 16 Johns. 198; 8 Am. Dec. 306.

the grantee is to pay the purchase money at some future time, as where A purchases land with his own money, but, before the execution of the deed, enters into a verbal contract with B by which the deed from the grantor is executed to B directly, on B's promise to pay at some future time to A the purchase money. A cannot claim a resulting trust in the land conveyed.¹ Where a brother executed a declaration of trust that his father had given him a certain sum of money with which to purchase land for the use of his sister, and promised in the declaration of trust to convey fifty acres, which he described, for her separate use, and had given a receipt stating that he had purchased the whole tract of one hundred acres "which was intended for his sister," and there was evidence to show that he did not claim any of the land till his father's death, and other circumstances showing a trust in the whole tract, it was held that he might rebut the presumption of a trust in the whole, by his own testimony that the receipt contained a mistake in stating that all the land was for his sister, and by other evidence that there was an understanding in the family that fifty acres only were to be held in trust by him.² A grantor who has conveyed land with a covenant of warranty is estopped from asserting that he had an interest in the purchase money from which a resulting trust might arise.³

§ 1185. Benefit inconsistent with the trust.—"The trust which results to the purchaser by operation of law, must be a pure, unmixed trust of the ownership and title of the land or estate itself, and not an interest in the proceeds of the land, nor a lien upon it as a security for an advance or other demand, nor an equity or a right to a sum of money to be raised out of the land, or upon the security of it. These rights are the subjects of the contracts or agreements of the parties, and may form the

¹ *McCue v. Gallagher*, 23 Cal. 51.

² *Hays v. Quay*, 68 Pa. St. 263.

³ *Squire v. Harder*, 1 Paige, 494; 19 Am. Dec. 446.

substance of express trusts, but they require for their subsistence that the title and legal estate of the premises, which yields the aliment that sustains them, should reside, not nominally but potentially, in the trustee. The sole operation of pure and simple trusts is to vest the estate in the actual purchaser, in exclusion of the nominal grantee, and not to regulate the equitable rights and interests of those for whose benefit the legal owner may be under a moral obligation to hold or apply it.”¹ Accordingly, where money for the purchase of land was furnished by three persons jointly, and it was agreed that two of them should take the title in fee, and the third, in consideration of the money advanced by her, should have wood from the land during her life, and the deed was taken in the name of one of the two, no trust results in favor of the third person.² And if the parties express a trust in writing at the time of the transaction, this supercedes any resulting trust which might otherwise arise.³ An owner of a farm and a person intending to purchase it, agreed that in consideration of the conveyance, the latter would support the owner and his wife during their lives, and after the grantor's death would pay to his estate a stipulated sum. The owner, in compliance with this agreement, conveyed the farm in fee, and the grantee executed a deed thereof to the grantor and his wife for their lives. But, when requested, the grantee refused to give an obligation of any character to support the grantor and his wife, or to pay the sum determined upon to his estate after his decease. These facts, it was held, did not create a resulting trust.⁴

§ 1186. **Professional services.**—The rendition of professional services forms a sufficient consideration, it is

¹ *Dow v. Jewell*, 21 N. H. 470, 488, per Gilchrist, O. J.

² *Dow v. Jewell*, 21 N. H. 470.

³ See *Alexander v. Warrance*, 17 Mo. 230; *Clark v. Burnham*, 2 Story, 1; *Dennison v. Goehring*, 7 Pa. St. 175; 47 Am. Dec. 505; *Anstice v. Brown*, 6 Paige, 448; *Mercer v. Stark*, Walker, 451; 12 Am. Dec. 583; *Leggett v. Dubois*, 5 Paige, 114; 28 Am. Dec. 413.

⁴ *Hunt v. Moore*, 6 Cush. 1.

held, to raise a resulting trust in favor of the person rendering the services.¹ An owner, however, of overdue promissory notes, desirous of collecting the money due on them, and having no means to pay attorney's fees and costs, arranged with an attorney to take the notes for collection. The notes were indorsed to the attorney under an agreement by which he was to furnish money to pay costs and disbursements, to bring suit on the notes in his own name, and should be reimbursed out of the proceeds of the notes when collected, for his fees and outlays, and the attorney gave to the owner a receipt stating that the notes were received for collection. The attorney commenced actions in his own name, secured judgment, had an execution issued which was returned unsatisfied, and subsequently made an agreement with a brother of one of the defendants in the judgment, the result of which was that the brother conveyed to the attorney a tract of land, and the attorney assigned the judgment to him, and also paid him eight hundred dollars, the attorney at all times being solvent and willing to pay the original owner of the notes whatever was due him on a settlement. It was held that the attorney did not hold the land conveyed to him, in trust for his client, and that the latter was entitled to recover only the money due him on a fair settlement.²

¹ *White v. Sheldon*, 4 Nev. 280.

² *Robles v. Clarke*, 25 Cal. 317. Said Sawyer, J., in delivering the opinion of the court: "What is there on the part of the defendant in this transaction that is objectionable on the score of the strictest principles of good morals, or in any respect inconsistent with his duty to his client? Had he immediately tendered plaintiff in cash the balance credited to him, the most rigid casuist could find nothing in the transaction of which he could complain. The defendant would have performed to its fullest extent the object of the trust. Had the judgment been a lien on the property, and had he purchased it at a sale on the execution for a sum less than the amount coming to his client on the judgment, and sought to retain the benefit of the purchase for himself, his interest and his duty would have conflicted; for, in that case, it would have been his interest to obtain the land at as low a rate as possible, while it would have been his duty to get as much as possible out of the land, until sufficient should be realized to liquidate the amount due to the client. But

§ 1187. **Conveyance of legal title only.**—When a person who has in himself both the legal and equitable title to property, conveys or devises the legal estate, intending to convey this title only, a trust will result to him as to the estate not transferred. When the question of the intention of the party conveying is not expressed, and becomes a matter of presumption, parol evidence is admissible to ascertain his intention.¹ Where a party in possession without right is deprived of possession, without, however, depriving him of any right of possession at law resulting from his actual prior possession, the wrongdoer, if he purchases the title from the lawful owner, does not hold the title in trust.²

§ 1188. **Laches of cestui que trust.**—The rule in equity is that the court will not give its aid to enforce a resulting

this was not his position. The chance for making the money on the judgment was desperate. An opportunity occurred, wherein by advancing a considerable sum of money himself, and taking upon his own shoulders all the risks of a purchase of the lands in the condition stated, upon which he had no judgment lien, he could secure his own interest in the judgment, and, at the same time, fulfill both the letter and spirit of his trust, and he embraced it. In this we can see no breach of duty, or misapplication of trust funds within the principle of any case that has been brought to our notice, unless the fact that the amount due plaintiff was not immediately tendered to him in cash by defendant changes the aspect of the case."

¹ See *Barrett v. Buck*, 12 Jur. 771; *Levet v. Needham*, 2 Vern. 138; *Hogan v. Strayhorn*, 65 N. C. 279; *Wych v. Packington*, 3 Brown Ch. 44; *Fletcher v. Ashburner*, 1 Brown Ch. 501; *Sewell v. Denny*, 10 Beav. 315; *Cooke v. Dealey*, 22 Beav. 196; *Halford v. Stains*, 16 Sim. 488; *Trimmer v. Bayne*, 7 Ves. 520; *Petit v. Smith*, 1 P. Wms. 7; *Gladding v. Yapp*, 5 Mod. 56; *Cook v. Hutchinson*, 1 Keen, 50; *Langham v. Sandford*, 17 Ves. 435; *Docksey v. Docksey*, 2 Eq. Cas. Abr. 506; 3 Brown Parl. C. 39; *Walton v. Walton*, 14 Ves. 318; *North v. Orompton*, 1 Ch. Cas. Ch. 193; 2 Vern. 253; *Lake v. Lake*, 1 Wils. 313; *Barnes v. Taylor*, 27 N. J. Eq. 265; *Williams v. Jones*, 10 Ves. 77; *Nourse v. Finch*, 1 Ves. Jr. 344; 1 Perry on Trusts, § 150; *Lewin on Trusts*, 115. Parol evidence cannot be received to affect a trust created by writing: *Ralston v. Telfair*, 2 Dev. Eq. 255; *White v. Evans*, 4 Ves. 21; *Hughes v. Evans*, 13 Sim. 496; *Langham v. Sandford*, 17 Ves. 435; *Love v. Gaze*, 8 Beav. 472; *Gladding v. Yapp*, 5 Mod. 59; *White v. Williams*, 3 Ves. & B. 72; *Walton v. Walton*, 14 Ves. 322.

² *Scott v. Umbarger*, 41 Cal. 410.

trust after the lapse of a long period of time, and in the absence of any explanation of the laches of the *cestui que trust*. "Long and unexplained delay is a material circumstance against the establishment of implied trusts in real estate when parol evidence alone is relied upon for this purpose."¹

§ 1189. Deed without consideration.—It was thought at one time that if a man conveyed land without consideration a trust would result.² But it is now settled law that a trust does not result to the grantor merely because there was no consideration for the conveyance.³ Where a husband and his wife were about to separate, and the

¹ *Sunderland v. Sunderland*, 19 Iowa, 325, 329, per Dillon, J; *Strimpfler v. Roberts*, 18 Pa. St. 283; 57 Am. Dec. 606; *Brown v. Guthrie*, 27 Tex. 610; *Haines v. O'Connor*, 10 Watts, 315; 36 Am. Dec. 180; *Peebles v. Reading*, 8 Serg. & R. 484; *Trafford v. Wilkinson*, 3 Tenn. Ch. 701; *Newman v. Early*, 3 Tenn. Ch. 714; *Olegg v. Edmonson*, 8 De Gex, M. & G. 787; *Buckford v. Wade*, 17 Ves. 97; *King v. Purdee*, 6 Otto, 90; *Groves v. Groves*, 3 Younge & J. 172; *Douglass v. Lucas*, 63 Pa. St. 9; *Graham v. Donaldson*, 5 Watts, 451; *Miller v. Blose*, 30 Gratt. 744; *Best v. Campbell*, 62 Pa. St. 478; *Delane v. Delane*, 7 Brown Parl. O. 279; *Lewis v. Robinson*, 10 Watts, 338. See *Smith v. Patton*, 12 W. Va. 541; *Midmer v. Midmer*, 26 N. J. Eq. 299; *Jennings v. Shacklett*, 30 Gratt. 765.

² *Cecil v. Butcher*, 2 Jacob & W. 573; *Tolar v. Tolar*, 1 Dev. Eq. 456; 18 Am. Dec. 598; *Souerbye v. Arden*, 1 Johns. Ch. 240; 2 Story Eq. Jur. § 1199; 1 Perry on Trusts, § 161; *Lewin on Trusts*, 116.

³ *Burt v. Wilson*, 28 Cal. 632; 87 Am. Dec. 142; *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Hogan v. Jaques*, 19 N. J. Ch. 123; 97 Am. Dec. 644; *Lloyd v. Spillett*, 2 Atk. 150; *Hutchins v. Lee*, 1 Atk. 447; *Young v. Peachy*, 2 Atk. 257; *Jackson v. Cleveland*, 15 Mich. 94; 90 Am. Dec. 266; *Graff v. Rohrer*, 35 Md. 327; *Ownes v. Ownes*, 23 N. J. Eq. (8 Green. C. E.) 60. And see *Randall v. Phillips*, 3 Mason, 383; *Rathbun v. Rathbun*, 6 Barb. 98; *Leman v. Whitley*, 4 Russ. 423; *Graves v. Graves*, 29 N. H. 129; *Philbrook v. Delano*, 29 Me. 410; *Morris v. Morris*, 2 Bibb, 311; *Alison v. Kurtz*, 2 Watts, 187; *Movan v. Hayes*, 1 Johns. Ch. 339; *Wilkinson v. Wilkinson*, 2 Dev. Eq. 376; *Miller v. Wilson*, 15 Ohio, 108; *Farrington v. Barr*, 36 N. H. 861; *Gerry v. Stimson*, 60 Me. 186; *Squire v. Harder*, 1 Paige, 494; 19 Am. Dec. 446; *Titcomb v. Morrill*, 10 Allen, 15; *Cairns v. Colburn*, 104 Mass. 274; *Bartlett v. Bartlett*, 14 Gray, 278; *Whitton v. Whitton*, 3 Cush. 191; *Jackson v. Caldwell*, 1 Cowen, 622; *Walker v. Locke*, 5 Cush. 90. But see *Blodgett v. Hildreth*, 103 Mass. 486; *Haigh v. Kaye*, Law R. 7 Ch. 469; *McKinney v. Burns*, 31 Ga. 295; *Hickman v. Hickman*, 55 Mo. App. 303; *Weiss v. Heitkamp*, 127 Mo. 23; 29 S. W. Rep. 709.

husband, for the purpose of avoiding questions of dower, had certain property conveyed by an absolute deed, expressing a valuable consideration to a third person, it was held that where there was no assertion of fraud, mistake, or contrivance, the absence of a consideration was not sufficient to create a resulting trust in favor of the grantor.¹

¹ *Jackson v. Cleveland*, 15 Mich. 94; 90 Am. Dec. 266. "The case stands," said Mr. Justice Campbell, in delivering the opinion of the court, "upon the simple question whether such a deed, because made without any consideration in fact, involves a resulting trust in favor of the grantor. This deed contains a recital of consideration, and declares the uses in the ordinary form in favor of the grantee, his heirs and assigns in fee. It is in the form which would have been used had the land been bought and paid for, and it is designed upon its face to represent the grantee as an ordinary purchaser. The object, in fact, was to vest in him an indefeasible legal estate, whatever may have been the equities. And the intention to do this was not left subject to revocation, as the recording of the deed was made with an express purpose of having Cleveland enabled to convey, as he did convey, to the first person who became a purchaser of a portion of the estate. The equity, therefore, which is relied on in this cause depends upon the establishment of a principle that a voluntary deed, where no consideration in fact passes to the grantor, is subject to a trust in his favor, and no beneficial title vests in the grantee. This claim is not sustained by any authority. A voluntary deed which purports to be for the beneficial use of the grantee, and which was made deliberately, and without mistake or contrivance, does not differ from any other deed in binding the grantor, and can only be attacked by those having superior equities which the grantor had no right to cut off—as creditors and the like. The only case approaching it is where an equity is raised against a grantee in favor of the person who paid the purchase money. This trust is now abolished by our statutes, where the person paying the money has consented to the deed being thus made. And it could always be rebutted by showing that the land was intended to vest beneficially: *Phillips v. Crammond*, 2 Wash. C. C. 441, 445, 446; *Benbow v. Townsend*, 1 Mylne & K. 506; *Maddison v. Andrew*, 1 Ves. Sr. 58. And in *Delane v. Delane*, 4 Brown Parl. C. 258, it was held that a person paying purchase money, and allowing the deed to be made to another, precluded himself from setting up any such trust by holding such person out as the real owner, and witnessing a lease made by him as such. Upon this principle the action of Jacob Jackson, in procuring Cleveland to deed the parcel sold, would have rebutted such a trust, had this been the case of a purchase by one person in the name of another, and had the statute left such trusts to be enforced. The presumed intention to claim the title is rebutted by acquiescence in the assertion of ownership. This doctrine of resulting trusts has never been applied to mere voluntary conveyances. Mere want of consideration has never raised resulting trusts out of these: *Young v. Peachy*, 2 Atk. 256;

Where two partners are in debt, and one of them executes an absolute deed expressing a valuable consideration of both his individual property and his interest in the partnership property to the other, for the purpose of enabling the latter to raise money by mortgaging the same to pay the debts of the firm, no express trust is created, and none is implied by law.¹ But where the consideration for the execution of a deed from a son to his father is a verbal agreement by a father to make a will, and devise to the son certain property, and the father dies without having fulfilled his agreement, it has been held on the ground of the nullity of the agreement, and, therefore, the execution of the conveyance without consideration express or implied, that a trust results in favor of the son by implication of law, and that he may, on showing that the transaction was not a gift, set aside the conveyance and recover the property.²

Lloyd v. Spillet, 2 Atk. 148; Leman v. Whittey, 4 Russ. 423; Sturtevant v. Sturtevant, 20 N. Y. 30; 75 Am. Dec. 371. There is a class of cases which were referred to upon the argument, which depend upon the common-law rule that a feoffment without consideration, and which declared no uses, created a resulting use to the grantor; or, in other words, was practically no conveyance. But this doctrine has been held to be merely technical at law and in equity, and not at all dependent upon any question of consideration. It rests upon the principles underlying the second great class of resulting trusts, where a trust results in the residue of all estates after the uses or trusts upon which they are conveyed are exhausted. And accordingly, either the mention of a consideration, although nominal, or the declaration of uses, will prevent any trust resulting, and confirm the title in the feoffee: Lloyd v. Spillet, 2 Atk. 148; Saunders on Uses and Trusts, 334, 335; 2 Fonblanque's Equity, 133; 1 Spence Eq. 449, 450, 451, and cases cited. A court of chancery has never ventured against the expressed will of the donor, appearing on the face of the deed, to 'take the use from the donee, and give it back to the donor. In other words, uses annexed to a perfect gift, however gratuitous, were enforced': 1 Spence Eq. 450. We have found no authority which would justify us in raising a trust in the present case. Jackson saw fit to leave Cleveland untrammelled by any obligation. Whether he has abused confidence, as there is great reason to believe, or whether he was, as he claims, made a beneficiary to cut off others, is not material."

¹ Burt v. Wilson, 28 Cal. 632; 87 Am. Dec. 142.

² Russ v. Mebius, 16 Cal. 350.

§ 1190. **Payment for improvements.**—When the person holding the legal title in trust has expended money in the payment of taxes or the making of necessary improvements, he is entitled to hold the estate until he has been repaid. Where a person paid all of the purchase money for a tract of land, but the deed was made to himself and his sister, on the understanding and agreement that she should pay to him one-half of the sum paid as the purchase price, and he paid the taxes and made permanent improvements to the land by the erection of buildings and clearing up the land, it was held that she was not entitled to have half the land set off to her, without paying to her brother half of the purchase money, and also paying for half of the improvements.¹

¹ *Maloy v. Sloans*, 44 Vt. 311. It was also held in this case that a suit at law for partition might be perpetually enjoined if the sum due was not within the time and in the manner ordered by a court of equity. The performance of a resulting trust is made by the transfer of the title to the *cestui que trust*: *Millard v. Hathaway*, 27 Cal. 119.

CHAPTER XXXIII.

FIXTURES PASSING BY DEED.

- § 1191. Definition of the term.
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§ 1227. Permanent severance.

§ 1228. Temporary severance.

§ 1229. Severance by act of God.

§ 1230. Stoves, furniture, etc.

§ 1191. **Definition of the term.**—Various definitions have been given of the term “fixtures,” and it is difficult to select or frame one that would cover all cases, or that would not be subject to objection. In its most general signification, the word embraces everything which has, by artificial means, been permanently attached to the freehold.¹ Mr. Ferard says: “The term ‘fixtures’ is used by writers with various significations; but it is always applied to articles of a personal nature, which have been affixed to land. On some occasions, no further idea is intended to be conveyed by the term than the simple fact of annexation to the freehold; and hence have arisen the popular expressions of landlord’s fixtures, and tenant’s fixtures; of removable and irremovable fixtures. The name of fixtures is also sometimes applied to things expressly to denote that they cannot be legally removed; as when they have been annexed to a house, etc., and the party who has affixed them is not at liberty afterward to sever and take them away. Thus, it is said, that an article shall fall in with the lease to the landlord, or descend to the heir with the inheritance because it is a fixture. There is, however, another sense in which the term “fixtures” is very frequently used, and which it is thought expedient to adopt in the following treatise, viz., as denoting those personal chattels which have been annexed to land, and which may be afterward severed and removed by the party who has annexed them, or his personal representatives, against the will of the owner of the freehold.”²

¹ Fixtures are “chattels or articles of a personal nature which have been affixed to the land”: Tomlin’s Law Dict. Fixtures. See *Merritt v. Judd*, 14 Cal. 59.

² Ferard on Fixtures, 1, 2. In *Teaff v. Hewitt*, 1 Ohio St. 511, 524; 59 Am. Dec. 634; s. c. 1 Am. Law Reg. (O. S.) 723, Mr. Chief Justice Bartley says: “The term ‘fixture’ has been used by various writers and in numerous reported decisions, as denoting personal chattels annexed to the land, which may be severed and removed against the will of the

Another definition given is: "Personal chattels affixed to real estate, which may be severed and removed by the

owner of the freehold by the party who has annexed them, or his personal representatives: Amos & Ferard on the Law of Fixtures, 2; Gibbon's Manual of the Law of Fixtures, 5; Grady's Law of Fixtures, 1; 2 Bouvier's Institutes of American Law, 162; 2 Kent's Com. 344. There may be some propriety in this definition of the term when confined in its application to the relation of landlord and tenant, or tenant for life or years, and remainderman or reversioner, to which several of the elementary writers have confined their attention. But it does not appear to express the accurate meaning of the term in its general application. An article attached to the realty, but which is removable against the will of the owner of the land, has not lost the nature and incidents of chattel property. It is still movable property, passes to the executor, and not to the heir on the death of the owner, and may be taken on execution and sold as other chattels, etc. A removable fixture, as a term of general application, is a solecism—a contradiction in words. There does not appear to be any necessity or propriety in classifying movable articles, which may be for temporary purposes somewhat attached to the land, under any general denomination distinguishing them from other chattel property. A tree growing upon the soil, or any other article belonging to the freehold, may be converted into a chattel by a severance from the land. It is an ancient maxim of the law that whatever becomes fixed to the realty, thereby becomes accessory to the freehold, and partakes of all its legal incidents and properties, and cannot be severed and removed without the consent of the owner. *Quicquid plantatur solo, solo cedit*, is the language of antiquity, in which the maxim has been expressed. The term 'fixture,' in the ordinary signification, is expressive of the act of annexation, and denotes the change which has occurred in the nature and the legal incidents of the property; and it appears to be not only appropriate, but necessary to distinguish this class of property from movable property, possessing the nature and incidents of chattels. It is in this sense that the term is used in far the greater part of the adjudicated cases: Co. Lit., 53 a, 4; 2 Smith's Leading Cases, 114; Chancellor Kent's note a; 2 Kent's Com., 345; *Dudley v. Ward*, Amb. 113; *Elwes v. Mawe*, 3 East, 57. It is said that this rule has been greatly relaxed by exceptions to it, established in favor of trade, and also in favor of the tenant, as between landlord and tenant. And the attempt to establish the whole doctrine of fixtures upon these exceptions to the general rule, has occasioned much confusion and misunderstanding on this subject. Amos and Ferard, in their treatise on the law of fixtures, mention the division of the subject into removable and irremovable fixtures, and give a definition of each class. See Amos & Ferard on Fixtures, p. 11. And they remark 'that it is difficult to determine in which of the above senses it is most frequently employed.' This classification of fixtures may be essential to a correct understanding of the double sense in which the term has been frequently used in the authorities, but it would not seem to be needed for any other purpose."

party who has affixed them, or by his personal representative against the will of the owner of the freehold.”¹ In the language of Baron Parke, the term “fixtures” “is used more generally with reference to such inanimate things of a personal nature as have become affixed or annexed to the realty, but which may be severed, disunited, or removed by the party, or his personal representatives, who has so affixed them without the consent of the owner of the freehold.”²

§ 1192. General rule between grantor and grantee. Between landlord and tenant, the rule that a chattel attached to the freehold becomes a part of the realty, is applied with less strictness than it is when the question arises between grantor and grantee. A deed conveys not only the land described, but everything appurtenant to it. “The general rule of law is, that whatever is once annexed to the freehold becomes parcel thereof, and passes with the conveyance of the estate. Though the rule has been in modern times greatly relaxed, as between landlord and tenant, in relation to things affixed for the purposes of trade and manufacture, and also in relation to articles put up for ornament or domestic use, it remains in full force as between vendor and vendee. As a general thing, a tenant may remove what he has added, when he can do so without injury to the estate, unless it has become by its manner of addition an integral part of the original premises. But not so a vendor; as against him, all fixtures pass to his vendee, even though erected for the purposes

¹ 1 Bouv. Law Dict. tit. Fixtures.

² In *Hallen v. Runder*, 1 Crompt. M. & R. 266, 276; s. c., 9 Tyrw. 959. For other authorities in which definitions have been given, see *Pickerell v. Carson*, 8 Iowa, 544; *Prescott v. Wells*, 3 Nev. 82; *Sheen v. Rickie*, 5 Mees. & W. 175; *Beardsley v. Ontario Bank*, 31 Barb. 619, 629; *Rogers v. Gilinger*, 30 Pa. St. 185; 72 Am. Dec. 694; *Coddington v. Beebe*, 29 N. J. 550; *Climie v. Wood*, Law R. 3 Ex. 257; *Voorhees v. Freeman*, 2 Watts & S. 106; 37 Am. Dec. 490; *Providence Gas Co. v. Thurber*, 2 R. I. 22; 55 Am. Dec. 621; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 645, n; *Hoyle v. Plattsburgh etc. R. R. Co.*, 51 Barb. 45; *McGorrick v. Dwyer*, 78 Iowa, 279; 16 Am. St. Rep. 440; *Hutchins v. Masterson*, 46 Tex. 551; 26 Am. Rep. 286.

of trade and manufacture, or for ornament, or domestic use, unless specially reserved in the conveyance.”¹ “In the whole range of jurisprudence,” says Tarbell, J., “there is, perhaps, no subject more difficult of definite rules than the matter of fixtures. The common-law rule, it is true, is precise, and were there no exceptions thereto, would be conclusive upon this case. But many exceptions have been sustained in favor of tenants for the benefit of trade, and for the protection and encouragement of modern improvements in machinery. In favor of tenants the greatest liberality is indulged, while as between vendor and vendee, and mortgagor and mortgagee, the strictest construction obtains.”²

¹ *Sands v. Pfeiffer*, 10 Cal. 258, 264, per Field, J. It was held in that case that the engine and boiler permanently attached to a flour mill which had its foundation in the ground was a fixture, and passed to the purchaser of the premises under a decree of foreclosure of a mortgage. In *Crane v. Brigham*, 11 N. J. Eq. (3 Stockt.) 29, 34, it is said: “The rule with regard to fixtures has been much relaxed, as between tenant for life or in tail and remainderman, and also as between landlord and tenant; but as between heir and executor, grantor and grantee, the rule has undergone no change.” A church organ built into a church as a part of the structure is a fixture: *Chapman v. Union Mut. L. Ins. Co.*, 4 Ill. App. 29; *Rogers v. Crow*, 40 Mo. 91; 93 Am. Dec. 299. But seats used in a church and not permanently attached are furniture merely: *Chapman v. Union Mut. Life Ins. Co.*, 4 Ill. App. 29.

² In *Tate v. Blackburne*, 48 Miss. 1, 4. In *Degraffenreid v. Scruggs*, 4 Humph. 451, 455, 40 Am. Dec. 658, Green, J., delivering the opinion of the court, said: “The original rule of the common law was that everything which was affixed to the freehold was subjected to the law governing the freehold. But in later times this rule has been greatly relaxed in favor of tenants, and in relation to fixtures erected for the purpose of trade. But as between executor and heir, and between the vendor and vendee, the original rule prevails that whatever is affixed to the freehold passes with it.” See, also, *Preston v. Briggs*, 16 Vt. 123; *Lafin v. Griffiths*, 35 Barb. 58; *Childress v. Wright*, 2 Cold. 352; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205; 37 Am. Dec. 203; *Holmes v. Tremper*, 20 Johns. 30; 11 Am. Dec. 238; *Murdock v. Gifford*, 18 N. Y. 31; *Burnside v. Twitchell*, 43 N. H. 393; *Snedeker v. Warring*, 12 N. Y. 174; *Lathrop v. Blake*, 23 N. H. 64; *Johnson v. Wiseman*, 4 Met. (Ky.), 359; *Robinson v. Preswick*, 3 Edw. Ch. 246; *Hawes v. Lathrop*, 38 Cal. 493; *McKiernan v. Hesse*, 51 Cal. 594. In *Miller v. Plumb*, 6 Cowen, 666, 16 Am. Dec. 456, *Woodworth, J.*, said: “The more important question is whether the potash kettles, being affixed to the freehold, passed with the land. If they did, the court below erred; and

§ 1193. **Comments.**—The relaxation in favor of tenants is placed upon grounds that do not apply to grantors. The tenant has not the control of the land, and to refuse

the judgment must be reversed, unless the case falls within some of the qualifications or exceptions to the general rule. That rule appears to be well established; whatever is affixed to the freehold becomes part of it, and cannot be removed. Exceptions have been admitted between landlord and tenant; between tenant for life or in tail and the reversioner; yet the rule still holds between heir and executor. (Bul. N. P. 34.) In *Holmes v. Tremper*, 20 Johns. 30, 11 Am. Dec. 238, Chief Justice Spencer says: 'When a farm is sold without any reservation, the same rule would apply as to the right of the vendor to remove fixtures, as exists between the heir and executor.'"

In *Fratt v. Whittier*, 58 Cal. 126, 41 Am. Rep. 251, the subject of what are fixtures, and what rule should prevail between grantor and grantee, was exhaustively considered. It was said by Mr. Justice McKee in the course of the opinion of the court: "What is accessory to real estate is according to the rule of the common-law part of it, and passes with it by alienation. That rule has been, in the growth of the law, greatly modified as between landlord and tenant, for the encouragement of trade, manufacture, agriculture, and domestic convenience; and courts recognize and enforce the right of removal by a tenant, of chattels annexed to the freehold for such purposes. But the rule which is applicable to persons in that relation does not apply as between heir and executor, vendor and vendee. As between the latter the rule of the common law is still applicable, except so far as it may be modified by statutory regulations upon the subject. So that chattels attached to the freehold by the owner, and contributing to its value and enjoyment, pass by the grant of the freehold, if the grantor had power to convey: *Tourtellot v. Phelps*, 4 Gray, 378. And after conveyance they cannot be severed by the vendor or any one else than the owner. As between vendor and vendee, therefore, the rule for determining what is a fixture is always construed strongly against the seller. Many things pass by a deed of a house, being put there by the owner and seller, which a tenant who had put them there might have removed, and they will be regarded as fixtures, which pass to the vendee, although annexed and used for purposes of trade, manufacture, or for ornament or domestic use. Thus, potash kettles appertaining to a building for manufacturing ashes (*Miller v. Plumb*, 6 Cowen, 665; 16 Am. Dec. 456); a cotton-gin fixed in its place (*Bratton v. Clausen*, 2 Strob. 478); a steam engine to drive a bark mill (*Oves v. Oglesby*, 7 Watts, 106); kettles set in brick in dyeing and print works (*Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 207; 37 Am. Dec. 203); iron stoves fixed to the brickwork of chimneys (*Goddard v. Chase*, 7 Mass. 432); wainscot work, fixed and dormant tables, engines and boilers used in a flourmill and attached to it (*Sands v. Pfeiffer*, 10 Cal. 259); a steam engine and boiler fastened to a frame of timber and bedded in a quartz ledge, and used for the purpose of working the ledge (*Merritt v. Judd*, 14 Cal. 59); a conduit or waterpipe to conduct water

him permission to remove chattels affixed by him during his tenancy to the realty, for the purposes of trade, manufacture, or agriculture, would, in many instances, work serious and unnecessary hardship upon him. But considerations of this character, obviously, have no application to a grantor. The latter exercises complete control over the land, and all fixtures attached to it. The law considers the fixtures as realty, and if he chooses to sell without reserving the right to remove them, he has no just cause for complaint if that effect is given to his deed which its terms import.

§ 1194. **Purchaser at sale on execution.**—The same rule that prevails with reference to determining whether fixtures pass by a conveyance made by a private person also applies where a sale is made by virtue of legal process. Where a purchaser of land at an execution sale claimed certain property as fixtures on the ground that they were attached to the realty, the court observed: "This is a sale by the owner through the instrumentality of the sheriff, and the doctrine in regard to fixtures applicable to it is that which governs between vendor and purchaser."¹ Parol evidence is inadmissible to show that certain buildings were reserved by mutual consent from sale, the judgment debtor having the right to remove them, when the return of the officer does not show

to a house (*Philbrick v. Ewing*, 97 Mass. 134); hop-poles in use on a hop farm (*Bishop v. Bishop*, 11 N. Y. 123; 62 Am. Dec. 68); statues erected for ornament, though only kept in place by their own weight (*Snedeker v. Warring*, 12 N. Y. 170); in fact, whatever the vendor has annexed to a building for the more convenient use and improvement of the premises, passes by his deed. The true rule deduced from all the authorities, says the Supreme Court of Virginia, seems to be this, that when the machinery is permanent in its character, and essential to the purpose for which the building is occupied, it must be regarded as realty, and passes with the building; and that whatever is essential for the purposes for which the building is used will be considered as a fixture, although the connection between them may be such that it may be severed without physical or lasting injury to either: *Green v. Phillips*, 26 Gratt. 752; 21 Am. Rep. 323; *Shelton v. Ficklin*, 32 Gratt. 735." See, also, *Wilson v. Steel*, 13 Phila. 153; *Stillman v. Flenniken*, 58 Iowa, 450; 43 Am. Rep. 120.

¹ *Farrar v. Chauffetete*, 5 Denio, 529.

such an exception.¹ A steam engine, with its fixtures, was held to be realty, and to pass by a sale of the freehold upon execution.² So a marine railway, consisting of iron and wooden rails, endless chain, gear, wheels, and ship cradle, was held to pass by a levy and sale of the realty upon execution.³

§ 1195. Partition by tenants in common.—The rule is the same when the question arises on a partition made by cotenants. Where two persons were tenants in common of a piece of land, and one of them with the consent of the other erected at his sole expense a store, permanently annexing it to the freehold, it was held in an action of partition that the store could not be treated as

¹ In a case in Maine, an offer was made to show that the creditor's attorney, considering certain buildings on the land as of little value, directed the officer not to set them off, but to appraise sufficient land exclusive of the buildings to satisfy the execution, which he did; that at the time livery of seisin was made, the attorney declared that the buildings did not belong to the creditor, but to the execution debtor, who might remove them when he chose; that the buildings were accidentally omitted from the officer's return, and that they stood on blocks without any foundations sunk into the ground. The court held that there was no difference between a conveyance by legal process and a conveyance by deed in the rules of construction, and that parol evidence was inadmissible to show that the buildings were excepted; *Waterhouse v. Gibson*, 4 Greenl. 230. *Weston, J.*, delivering the opinion of the court, said: "In determining whether the barn and shop in question belonged to the plaintiff, we must regard the levy of Brooks upon the land of his execution debtor, Jack, as having the same effect as if the latter had passed the land to the former by deed. Jack was the owner of the buildings as well as of the land, and if he had conveyed the land by deed, without any exception or reservation, we entertain no doubt that the buildings thereon standing would have passed. . . . The levy operating upon the buildings as well as the land, it was not competent to show that the former was excepted by parol testimony. This would be materially to vary and modify by parol the effect of written evidence which by law is clearly inadmissible."

² *Oves v. Ogelsby*, 7 Watts, 106. See, also, *Stillman v. Flenniken*, 58 Iowa, 450; 43 Am. Rep. 120.

³ *Strickland v. Parker*, 54 Me. 263. See, also, *Trull v. Fuller*, 28 Me. 545; *Moore v. Smith*, 24 Ill. 512; *Payne v. Farmers' etc. Bank*, 29 Conn. 415; *Symonds v. Harris*, 51 Me. 14; 81 Am. Dec. 553; *Boyle v. Swanson*, 6 La. Ann. 263; *Powell v. Monson etc. Mfg. Co.*, 3 Mason, 459.

the separate property of the cotenant who erected it.¹ "The question is one between tenants in common, the owners of the fee; and is, we think, to be decided on the same principle, as if partition had been effected by the parties through mutual deeds of bargain and sale. As between such parties, the doctrine of fixtures making a part of the freehold, and passing with it, is more extensively applied than between any others."²

§ 1196. Mortgagee considered a purchaser.—The rule that applies between grantor and grantee also applies between mortgagor and mortgagee. The mortgagor is the owner of the fee. The reason that causes the ancient rule that a chattel affixed to the realty becomes a part of it, to be enforced in all its rigor against a grantor, applies with equal force when fixtures are erected by a mortgagor. He has the power of exempting them from the operation of his mortgage, if he so desires. If he does not do so the general terms of description in the instrument are to

¹ *Baldwin v. Breed*, 16 Conn. 60. *Williams, C. J.*, delivering the opinion of the court, said: "The title of a purchaser or creditor ought not to be qualified or impaired, for want of an inquiry as to which of the tenants in common planted the trees, set the hedges, or erected the fences or buildings; no authority has been shown and no usage proved in support of such a claim. And when we consider the extreme uncertainty as to title which would result from the adoption of such a principle, and the embarrassments which would attend the purchaser and the creditors, together with the anxious care which our law has shown in making as public as possible the title to real estate, we cannot consent to incorporate the principle contended for, unless compelled by authority. . . . In the absence, then, of any special agreement between the parties, we think neither a court of law nor a court of chancery could treat this store as the separate property of one of these tenants in common. And the remark of *Tilghman, C. J.*, in *Lyle v. Ducomb*, 5 Binn. 588, is entirely applicable to this case: 'The idea of separating the building from the ground on which it stands is altogether novel, and cannot be carried into effect without great difficulty.'"

² *Cowen, J.*, in *Walker v. Sherman*, 20 Wend. 636, 638. See, also, *Parsons v. Copeland*, 38 Me. 537; *Plumer v. Plumer*, 30 N. H. (10 Fost.) 558, 569. In *Plumer v. Plumer*, *supra*, it was held that where a partition of real estate is made under the decree of the court, all the incidents and appurtenances attached to the several parts of the land, pass to the persons to whom they have been assigned, unless a different order is made.

be construed by the same rules as if they were inserted in an absolute conveyance. In a case where a steam-engine and boilers, and the engines and frames adapted to be moved and used by the steam-engine by means of connecting wheels, were held to be a part of realty, as between mortgagor and mortgagee, Chief Justice Shaw observed: "A different rule may exist in regard to the respective rights of tenant and landlord, tenant for life, and remainderman or reversioner, and, generally, when one has a temporary, and not a permanent interest in land. In those cases, the rule as to what shall constitute fixtures is much relaxed in favor of those who make improvements on the real estate of others, for the purposes of trade or other temporary use and enjoyment.¹ But the case of mortgagor and mortgagee stands upon a different footing. The mortgagor, to most purposes, is regarded as the owner of the estate; indeed, he is so regarded to all purposes, except so far as it is necessary to recognize the mortgagee, as legal owner, for the purposes of his security. The improvements, therefore, which the mortgagor remaining in the possession and enjoyment of the mortgaged premises makes upon them, in contemplation of law, he makes for himself, and to enhance the general value of the estate, and not for its temporary enjoyment; whereas, a tenant, making the same improvements upon the estate of another, with a view to its temporary enjoyment, must be presumed to do it for himself, and not for the purpose of enhancing the value of the freehold. This rule, of course, will apply only to that class of improvements consisting of articles added, and more or less permanently affixed to the realty, in regard to which it is doubtful whether they are thereby made part of the realty or not, and when that question is to be decided by the presumed intent of the party making them. Take, for instance, the case of a dye kettle set in brickwork, which is for the time annexed to the freehold, but which may be removed without essential injury to the building, and

¹ Citing *Gaffield v. Hapgood*, 17 Pick. 192; 28 Am. Dec. 290.

so as to leave the premises in as good a condition as if it had not been set. If so set by an owner of the fee for his own use, it would, we think, be regarded as a fixture, an addition made to the realty by its owner as an improvement, and would pass to the heir by descent, or to the devisee by will. But if the same addition had been made by a tenant for years, for the purpose of carrying on his own business, we think he would have a right to remove it, provided he exercise that right whilst he has the rightful possession of the estate, that is, before the expiration of his term. . . . It is obvious that this question cannot arise where there is any express stipulation in the mortgage deed, declaring either that such improvements to be made, and which are in their nature equivocal, shall or not be deemed fixtures and be bound as part of the realty. The question is, what is the reasonable and legal construction of a deed, granting an estate or mortgage in the usual terms, where there is no stipulation on the subject? Such a deed must, of course, include all additions which become *de facto* part of the realty, and which are not in their nature equivocal; because a title to the whole includes every part. In regard to articles doubtful in their nature, we have already stated as our opinion, that if added by the mortgagor it is to be considered as done by way of permanent improvement, for the general benefit of the estate, and not for its temporary enjoyment.¹ One of the objects, and indeed one of the most usual purposes of mortgaging real estate, is to enable the owner to raise money to be expended on its improvement. If such improvements consist in actual fixtures, not doubtful in their nature, they go, of course, to the benefit and security of the mortgagee, by increasing the value of the pledge. The expectation of such improvement and such increased value often enters into consideration of the parties, in estimating the value of the property to be bound, and its sufficiency as security for the money advanced. And we think the same rule

¹ Citing *Hunt v. Hunt*, 14 Pick. 386; 25 Am. Dec. 400.

must apply to those articles which, in their own nature, are doubtful, whether actual fixtures or not, on the ground of the presumed intention of the parties. A presumption arises from the relation in which they stand, that such improvements are intended to be permanent, and not temporary, and that the freehold and the improvements intended to be made upon it are not to be severed, but to constitute one entire security. The mortgage is usually but a collateral security for money which the mortgagor binds himself to pay, and is, therefore, a hypothecation only, and not an alienation of the mortgaged estate. And in this respect the distinction between the tenant for years and the mortgagor is broad and obvious. The tenant for years can have no benefit from his improvements after the expiration of his term, but by his right to remove them, when they are capable of removal; but the mortgagor has only to pay his debt, as he is bound to do, and as it is presumed he intends to do, and then he has all the benefit of his improvements in the enhanced value of the estate to which they have been annexed. The latter, therefore, may be presumed to have intended to annex the improvements to the freehold, and make them permanent fixtures; whilst the former must be presumed, from his obvious interest, to erect the improvements for his own temporary accommodation during his term, intending to remove them before its expiration.”¹

¹ In *Winslow v. Merchants' Ins. Co.*, 4 Met. 306, 310, 312; 38 Am. Dec. 368. In *Lafin v. Griffiths*, 35 Barb. 58, the owner of a piece of real estate erected on it a keg factory, and placed in the factory machinery for the purpose of carrying on his business. He executed a mortgage upon the premises, and, as this was not paid when it became due, the mortgagee took possession. A year prior to this a creditor had recovered a judgment against the owner of the fee, and the execution was levied upon a part of the machinery and implements of the factory, which were removed from the building by means of levers. The court held that the articles of machinery were fixtures, and passed to the mortgagee; Gould, J., delivering the opinion of the court, and saying: “In considering this case, and determining whether the articles in question were or were not fixtures, we are to follow the decision in *Snedeker v. Warring*, 2 Kern, 174, holding the same rule, as between mortgagor and mortgagee, that

§ 1197. General rule as to fixtures passing by deed.

As a general rule, all fixtures annexed to the realty pass by a deed of the land. Thus, a dyehouse and dye kettles secured in brickwork become a part of the realty, and are transferred by a deed of the land without express words.¹ Between vendor and vendee, a bathing tub and lead waterpipes fastened to the walls and floor of a building by nailing are fixtures, and pass by a deed of the land on which they are placed. "The necessary pipes for conducting water through the apartments of a dwellinghouse and into a bathroom add greatly to the value, comfort, and convenience of the building, and a purchaser who appreciated such things would be sadly disappointed after he had received his deed, to find the house stripped of such fixtures."² A purchaser is entitled to a furnace so placed in a house, that its removal would necessarily cause the brickwork of the house adjoining the furnace to be disturbed, and a portion of the ceiling to fall.³ Potash kettles set in an arch of mason work with a chimney, the arches being set upon a platform but not fastened to the building, were held to pass by a deed of the premises.⁴ In a case in North Carolina, stills, put up for dis-

would be held as between grantor and grantee. And this, whether the mortgagee were or were not in possession of the premises. Nor can there be any doubt, if the property before detached were fixtures, that the person having the title to the realty could sue for the specific recovery of the things themselves, or in trespass for the damage to the freehold."

In *Cullwick v. Swindell*, 3 Eq. Cas. L. R. 248, 251. See, also, *Cullwick v. Swindell*, 3 Eq. Cas. L. R. 249; *Robinson v. Preswick*, 3 Edw. Ch. 246; *Coleman v. Stearns' Mfg. Co.*, 38 Mich. 30; *Main v. Schwarzwaelder*, 4 Smith, E. D. 273; *Longstaff v. Meagee*, 2 Ad. & E. 167; *Quinby v. Manhattan etc. Co.*, 24 N. J. Eq. 260; *Rogers v. Brokaw*, 26 N. J. Eq. 563; *Clark v. Reyburn*, 1 Kan. 281; *Harris v. Haynes*, 34 Vt. 220; *Gale v. Ward*, 14 Mass. 352; 7 Am. Dec. 223; *McKim v. Mason*, 3 Md. Ch. 186; *Lathrop v. Blake*, 3 Fost. 46; *Sparks v. State Bank*, 7 Blackf. 469; *Rice v. Adams*, 4 Har. (Del.) 332; *Corliss v. McLagin*, 29 Me. 115; *Preston v. Briggs*, 16 Vt. 124.

¹ *Noble v. Bosworth*, 19 Pick. 314.

² *Cohen v. Kyler*, 27 Mo. 122.

³ *Main v. Schwarzwaelder*, 4 Smith, E. D. 273; *Mather v. Frazer*, 2 Kay & J. 536.

⁴ *Miller v. Plumb*, 6 Cowen, 665; 16 Am. Dec. 456.

tilling, incased in brick and mortar work; a large copper kettle, put up for cooking food for hogs, which was also incased in brick and mortar work; and rough plank, put into a ginhouse to spread cotton seed upon, though not nailed down—were all held to be fixtures that pass by a deed conveying the fee.⁵ A deed of the premises will convey shelves, drawers, and counter-tables, put up by the owner to fit the building for the use of a retail dry goods and grocery store, and without which the building is not adapted to the business.⁶ Where a hotel is conveyed for

⁵ *Bryan v. Lawrence*, 5 Jones (N. C.), 337. See *Union Bank v. Emerson*, 15 Mass. 159; *Despatch Line v. Bellamy Mfg. Co.* 12 N. H. 205; 37 Am. Dec. 203. A stone derrick fastened by a post in the ground and by guy ropes, though it is capable of removal from point to point, is not a fixture: *Honeyman v. Thomas*, 25 Or. 539.

⁶ *Tabor v. Robinson*, 36 Barb. 483. Brown, J., delivering the opinion of the court, said: "The question is between vendor and vendee, and is to be determined by the rules which prevail and apply between persons in that relation. The shelves and drawers, the witnesses said, were put in after the usual way. There were stancils—which I take to have been standards or supports—fastened to the wall, and the shelves shoved into them. They were put and used for a dry goods and grocery store. There were four or five counter-tables, one of them 13 feet 9 inches long by 2 or 3 feet wide, tacked to the floor to make them stay there. They were put up, the witnesses said, to stay there. Another witness said the tables were nailed by putting a nail through the leg. Another said they were nailed, and had a cleat nailed down by the side of the legs, and they had been moved about the store a number of times. The qualities of a fixture are that it must be essential to the business of the erection, and attached to it in some way, or mechanically fitted so as, in ordinary understanding, to make a part of the building itself. It must be permanently attached, or the component part of some erection, structure, or machine which is attached to the freehold, and without which the erection, structure, or machine would be imperfect and incomplete. Physical annexation is not indispensable. Ponderous articles may be annexed by force of their own weight, and many others might be enumerated which are really portable and movable, and are moved about from time to time, and which are nevertheless a part of the freehold. For example, rail fences upon a farm, the keys and padlocks upon buildings, parts of the machinery of mills of various kinds, etc. These are carried about from place to place, but they are essential and indispensable parts of the machinery or structure, or of the farm, and necessary to its use and enjoyment. As between vendor and purchaser, they are fixtures. The shelves, drawers, and counter-tables, in the present case, were put up by the owner to fit the building for the uses of a retail dry goods and grocery store. Without them the building was

hotel purposes, with the appurtenances, without reservation, a hotel sign attached to a post placed firmly in the ground, seven or eight feet from the building, spiked to a sidewalk in front of the hotel, being placed in that position with intent that it should remain a permanent sign for the hotel, and being so attached as to be immovable without force, is also transferred by the deed.¹

not adapted to the business. They were made to fit the building which the defendant contracted to sell, and not fit for any other building. And when he removed them, the shelves, certainly, and the drawers and counter-tables, probably were little better than so much lumber. They were for these reasons fixtures, and a part of the freehold; and the defendant did wrong to remove them. The purchaser had every right to think he would receive them with his deed."

¹ *Redlon v. Barker*, 4 Kan. 445; 96 Am. Dec. 180. Safford, J., delivering the opinion of the court, said: "Let us suppose for a moment that the hotel sign—the property in dispute—had been in some way actually attached to the building at the time of the sale by Barker to Redlon, Rowley, and Jones, could it be maintained for a moment that it did not pass to the grantees under the terms of the sale as set forth? In that case it would have been a part of the building itself, requiring force to remove it, and appurtenant thereto. Besides, taking into consideration the purposes for which the building was used, it was something very necessary to a successful carrying on of the business. The building was 'Barker's Hotel,' and these words were on the sign at the time of the sale. The grantees purchased it for a hotel, with all the appurtenances thereunto belonging, and intending to keep it as such. They did so keep it, and for three months, under the name of Barker's Hotel. Under such a state of facts, and under the supposition above stated, can it be doubted that the sign would have passed with the premises to the grantees? We think not. But the sign, instead of being attached to the building itself, was fastened to a signpost in front of and within seven or eight feet of it, a sidewalk being between the post and the hotel. The post was sunk firmly into the ground, and the sign attached to it so as to require force to remove it. Does the fact of its being so placed render it less a part of, or less appurtenant to, the hotel premises than it would have been if actually attached to the building as above supposed? It performed the same office, and was just as necessary to the business carried on, and to be carried on, in the building in the one case as in the other. And we think that if the terms of sale would have passed the property in the sign to the grantees in the first instance, it would also pass it in the last. But it is claimed that when Barker demanded the sign from plaintiffs in error it was detached from the signpost and was without doubt a chattel, and no part of the real estate. This may all be true; but how can the rights of the parties be thereby affected? It having passed to the purchasers of the hotel once, they most certainly had the right to remove it, or let it alone as they pleased. Supposing Red-

§ 1198. **Instances.**—A grantor conveyed a house and land by a deed of warranty, and, at the time the conveyance was made, the only supply of water to the premises was through a pipe laid across the land of a third person to a highway. Here it joined a branch leading from the main pipe of an aqueduct company. The grantor at the time of his conveyance had the right, under a contract with the aqueduct company, and, on the payment of an annual compensation, to draw water from the main pipe through this branch for his own use and to dispose of it to others. Originally, the pipe from the house to the branch was laid, for the purpose of conveying water to the house, by a tenant of the grantor, under an oral license from the third person, over whose land it passed, and was bought of the tenant by the grantor at the expiration of his tenancy. After the execution of his deed, the grantor cut off this pipe at the boundary of the land which he had conveyed, and dug it up from there to its junction with the branch in the highway, and carried it off. The grantee brought an action against the grantor, and it was held that the pipe which had been dug up and carried off was a fixture appurtenant to the house, and passed to the grantee by the grantor's deed, but that the deed conveyed no right of drawing water from that pipe from the branch on the highway.¹ Gas fittings as distinguished

lon, Rowley, and Jones had seen proper to remove some of the doors or windows, or other parts of the building, to a carpenter's or paint shop, for the purpose of being repaired or painted, would that act of theirs have given Barker any right to claim them as his own? None will assert this for a moment. And yet their acts in relation to the sign were of the same character precisely."

¹ *Philbrick v. Ewing*, 97 Mass. 133. In section 453, the effect of a trust deed becoming void on the happening of a contingency was considered. In the case cited in that section, a tract of land with a building thereon was conveyed to trustees for the purpose of maintaining and establishing a school. The trustees made an addition to the building and caused the whole to be insured for a certain sum, and the building having been destroyed by fire, the amount of the loss was paid to the trustees. The trust deed contained a provision that if the design to establish and maintain a school should prove unsuccessful, the trustees should pass a resolution to that effect, and thereupon the

from gas-fixtures pass by a deed of the premises.' So does shafting when the means by which it is suspended

title should revert to the grantor. After the fire, the trustees passed a resolution of this nature, and also executed a reconveyance of the premises to the grantor. As this case involves, to some extent, the question of fixtures, the court deciding that the grantor was entitled to the proceeds realized from the policy of insurance, we deem it not improper, in this place, to call attention to this case on this point. The case referred to is *Hawes v. Lathrop*, 38 Cal. 493, in which Mr. Justice Rhodes, in delivering the opinion of the court, said (p. 497): "The addition to the house, which was erected by the trustees, was not personal property, but it became, like the house to which it was attached, a part of the realty. The strictness of the earlier rule requiring the structure to be attached to the soil, in order to become a fixture, is being relaxed in this country, in consequence of the manner in which very many buildings that are intended to be permanent, are erected. But the addition was, in this case, attached to the main building in such a manner that it constituted a part of the main building. The trustees, therefore, held the 'addition' by the same tenure that they held the lot and main building; and had the property reverted to the plaintiff before the fire, the 'addition' would have passed to him with the lot, without any special words of conveyance. The insurance of the building covered the 'addition' as well as the main building, and if the plaintiff is entitled to any part of the fund paid by the insurer on account of the loss, he is entitled to the whole. The trustees held the fund in their fiduciary, and not in their private, capacity. The persons to whom they paid the larger part of the money had made donations to the trustees for the benefit of the school, but without any conditions, and they had neither a legal nor equitable claim to the fund. Nor did any claim exist in favor of the persons to whom portions of the fund were paid on account of a loss of furniture sustained by one, or a personal injury sustained by the other. Upon the passage of the resolution referred to, the title to the real estate reverted to the plaintiff, and the trustees had no further duties to perform in maintaining the school, and, clearly, it would be unnecessary, and not within the scope of their duties, to expend any further sum of money for that purpose. The duties of the defendants as trustees having terminated upon the adoption of the resolution, it became their duty to pay over to the person entitled to it the insurance money in their hands. It is not and could not be claimed that the defendants are entitled to it; it could not be claimed on behalf of the school, for that no longer existed; and we are unable to see how anyone except the plaintiff can make out a plausible claim to it. Had the building with the addition remained upon the lot at the time of the adoption of the resolution, it would have vested in the plaintiff; and had the trustees expended the insurance money in rebuilding, before the adoption of the resolution,

¹ *Ex parte Acton*, 4 L. T., N. S., 261; *Ackroyd v. Mitchell*, 3 L., T. N. S., 236; *Ex parte Wilson*, 2 Mont. & A. 61.

are fixed and permanent.¹ So do waterwheels and gearing.² A deed of the realty will convey hydraulic presses and steam and water pipes, if they are fastened to the freehold.³ A threshing machine attached by bolts and screws to posts placed in the ground will pass as a fixture.⁴

the new building would have reverted to the plaintiff with the lot, and it would seem just and equitable that the plaintiff should be entitled to the insurance money remaining in the hands of the trustees when the design for the school failed. It represented, in their hands, the insured building. Had the deed made it the duty of the trustees to keep the building insured, and in case of a loss, to appropriate the insurance money to the erection of another building, there would be no difficulty in holding that, as between the parties to the deed, the money would in equity be treated as land. The trustees did not exceed their duty in effecting the insurance, and it would have been their duty, had not the project for the maintenance of the school failed, to have rebuilt; but they, not having rebuilt, and having determined that it was impracticable to maintain the school, the money stands in the stead of the building, and in equity, vested in the plaintiff, upon the termination of the trust, in the same manner as would the building had they expended the money in the erection of a building."

¹ *Harkness v. Sears*, 26 Ala. 493; 62 Am. Dec. 742; *Corliss v. McLagin*, 29 Me. 115; *Harris v. Haynes*, 34 Vt. 220; *Longbottom v. Berry*, Law R. 5 Q. B. 123; s. c. 39 Law J. (N. S.) Q. B. 37; *Hill v. Wentworth*, 28 Vt. 428; *Bowen v. Wood*, 35 Ind. 268; *Ex parte Montgomery*, 4 Ir. Ch. 520; *Quinby v. Manhattan etc. Co.*, 24 N. J. Eq. 260; *Mather v. Fraser*, 2 Kay & J. 536; s. c. 2 Jur., N. S., 900; *Allison v. McCune*, 15 Ohio, 726; 45 Am. Dec. 605. In *Wade v. Johnston*, 25 Ga. 331, the court say that when an article can be removed without material injury to the freehold or the article itself, it is a chattel, and not a freehold. And see *Farrar v. Chauffetete*, 5 Denio, 527.

² *Davenport v. Shants*, 43 Vt. 546; *Corliss v. McLagin*, 29 Me. 115; *McCluney v. Lemon*, Hayes, 154; *Bowen v. Wood*, 35 Ind. 268.

³ *Crane v. Brigham*, 11 N. J. Eq. 29; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; 37 Am. Dec. 203. See *Longbottom v. Berry*, Law R. 5 Q. B. 123; s. c. 39 L. J. (N. S.) Q. B. 37, 44; *Baker v. Davis*, 19 N. H. 325; *Bond v. Coke*, 71 N. C. 97. A deed of the land will convey steam engines: *Gary v. Burquieres*, 12 La. Ann. 227. But see *Randolph v. Gwynne*, 7 N. J. Eq. 88; 51 Am. Dec. 265. The poles, wires, and lamps of an electric light company pass as fixtures: *Keating Implement etc. Co. v. Marshall Electric Light etc. Co.*, 74 Tex. 605; *Regina v. North Staffordshire Ry. Co.*, 3 El. & E. 392. And see, further, as to electric lighting apparatus, *Vail v. Weaver*, 132 Pa. St. 363; 19 Am. St. Rep. 598; *New York Security Co. v. Saratoga Gas. Co.*, 34 N. Y. Sup. 890; *Havens v. West Side Electric Light Co.*, 44 N. Y. St. Rep. 589; 17 N. Y. Sup. 580.

⁴ *Wiltshear v. Cottrell*, 1 El. & B. 674; s. c. 22 Law J. 177. Iron pipes used for heating purposes will pass as fixtures: *Quinby v. Manhattan*

A building becomes a part of the realty if erected upon the lands of another, with no agreement that the same is to be held and regarded as personal property, and it will pass with a conveyance of the land.¹

§ 1199. Notice of fixtures.—Where the grantee has notice of the right of another to remove annexations to the land, they do not pass by a deed.² If a purchaser at an execution sale has notice that another person has the right to remove a house erected on the land, he is not entitled to damages for the removal.³ Some countenance has been given to the proposition that a purchaser would be bound by an agreement for the removal of fixtures, even if he had no notice of it.⁴ But on this point Mr.

etc. Co., 24 N. J. Eq. 260; *Ex parte Wilson*, 2 Mont. & A. 61. A windlass which was firmly fastened in a slaughterhouse passes by a conveyance: *Capen v. Peckham*, 35 Conn. 88. The machinery of a sash factory will pass as a fixture: *Green v. Phillips*, 26 Gratt. 752; 21 Am. Rep. 323. So will locks and doors: *Pettengill v. Evans*, 5 N. H. 54. An awning with its frames and a marble meat slab attached to a counter will pass by a conveyance: *Re Hitchings*, 4 Nat. Bank. Reg. (2d ed.) 384. The machinery of a paper mill will pass also: *Bowen v. Wood*, 35 Ind. 268. So will the malt mill and other machinery of an innkeeper employed in his business: *Walmsley v. Milne*, 7 Com. B., N. S., 115. Sawmill machinery will also pass: *Davenport v. Shants*, 43 Vt. 546. A cotton-gin which is fastened to a house by nails and braces will pass: *Degraffenreid v. Scruggs*, 4 Humph. 451; 40 Am. Dec. 658. A bell placed in a tower of a factory will pass: *Alvord Carriage Mfg. Co. v. Gleason*, 36 Conn. 86. But a bell placed upon two posts for temporary use, and not fastened to them, will not pass as a fixture: *Cole v. Roach*, 37 Tex. 413. See, also, *Weston v. Weston*, 102 Mass. 514.

¹ *Richtmyer v. Morss*, 3 Keyes, 349; s. c. 4 Abb. N. Y. App. 55. See, also, *Pea v. Pea*, 35 Ind. 387; *Cole v. Stewart*, 11 Cush. 181; *Butler v. Page*, 7 Met. 40; 39 Am. Dec. 757. As to grist mills, see *Potter v. Cromwell*, 40 N. Y. 287; 100 Am. Dec. 485; *Gardner v. Finley*, 19 Barb. 387; *Place v. Fagg*, 4 Man. & R. 277; s. c. 7 Law J. K. B. 195. As to cider mills and press, see *Wadleigh v. Janvrin*, 41 N. H. 503; 77 Am. Dec. 780.

² *Davis v. Buffum*, 51 Me. 160; *Coleman v. Lewis*, 27 Pa. St. 291; *Wilgus v. Gettings*, 21 Iowa, 177; *Haven v. Emery*, 33 N. H. 66; *Sowden v. Craig*, 26 Iowa, 156; 96 Am. Dec. 125; *Pierce v. Emery*, 32 N. H. 484; *Morris v. French*, 106 Mass. 326; *Mitchell v. Freedley*, 10 Pa. St. 198; *Hensley v. Brodie*, 16 Ark. 511; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Walker v. Schindel*, 58 Md. 360.

³ *Coleman v. Lewis*, 27 Pa. St. 291.

⁴ See *Mott v. Palmer*, 1 Comst. 564; *Ford v. Cobb*, 20 N. Y. 344; *Rus-*

Chief Justice Perley, of New Hampshire, in delivering the opinion of the court, said: "We are not yet prepared to acquiesce in such a doctrine. Primarily, and in the absence of notice to the contrary, the purchaser would seem to have a right to suppose that he was buying with all the incidents and appurtenances which the law, as a general rule, annexed to his purchase; and we should hesitate before we held that he could be affected by a private agreement not brought to his knowledge, which changed the natural and legal character of the property. But if the purchaser buy with notice of the agreement, and of the party's rights under it, he will be bound by it."¹ And in the same strain is the language of Mr. Justice Foster of Massachusetts: "Upon the question whether the character of property can be changed by agreement from realty to personalty as against a *bona fide* purchaser without notice, there is not entire harmony of the authorities; but we regard the better opinion as being that such a purchaser must have notice of the agreement before he acquires title, or he will be entitled to claim and hold everything which appears to be, and by its ordinary nature is, a part of the realty. To hold otherwise would contravene the policy of the laws requiring conveyances of interests in real estate to be recorded, seriously endanger the rights of purchasers, afford opportunities for frauds, and introduce uncertainty and confusion into land titles."²

sell *v.* Richards, 10 Me. 429; 26 Am. Dec. 254; 11 Me. 371; 26 Am. Dec. 532; Goddard *v.* Gould, 14 Barb. 662; Tapley *v.* Smith, 18 Me. 12; Hilborne *v.* Brown, 12 Me. 162; Hensley *v.* Broder, 16 Ark. 511; Sheldon *v.* Edwards, 35 N. H. 279; Crippen *v.* Morrison, 13 Mich. 34.

¹ In *Haven v. Emery*, 33 N. H. 66, 69.

² In delivering the opinion of the court in *Hunt v. Bay State Iron Co.*, 97 Mass. 279, 283. See, also, *Powers v. Dennison*, 30 Vt. 752; *Thropp's Appeal*, 70 Pa. St. 395; *Fortman v. Goepper*, 14 Ohio St. 565; *Brennan v. Whitaker*, 15 Ohio St. 446; *Fryatt v. Sullivan Co.*, 5 Hill, 116; *Davenport v. Shants*, 43 Vt. 546; *Prince v. Case*, 10 Conn. 375; 27 Am. Dec. 675; *Bringholff v. Munzenmaier*, 20 Iowa, 513; *Trull v. Fuller*, 28 Me. 545; *Landon v. Platt*, 34 Conn. 517; *Bratton v. Clawson*, 2 Strob. 478; *Dostal v. McCadden*, 35 Iowa, 318; *Pierce v. George*, 108 Mass. 78; 11 Am. Rep. 310; *Dame v. Dame*, 38 N. H. 429; 75 Am. Dec. 195; *Oliver v. Vernon*, 6 Mod. 179; *Crippen v. Morrison*, 13 Mich. 23; *Yater v. Mul-*

But where a tenant is in possession, his possession is notice of his rights.¹

§ 1200. Conveyance of structure passing title to land. Courts have frequently decided that a conveyance of a building or barn used as a term of description, will convey also the land upon which the building or structure may be erected.² Referring to the cases in which this principle has been announced, and the reason upon which it is founded, Bigelow, J., observes: "These authorities rest upon the sound and reasonable rule that whenever land is occupied and improved by buildings or other structures, designed for a particular purpose, which comprehends its practical use and enjoyment, it is aptly designated and conveyed by a term which describes the purpose to which it is thus appropriated."³

§ 1201. Land necessary to use of structure.—But only so much of the land as is necessary to the use of the structure will pass by implication by a conveyance of the structure itself, and this rule applies also to an exception

len, 23 Ind. 562; 24 Ind. 277; *King v. Wilcomb*, 7 Barb. 263. See, also, generally, on the question of notice of fixtures, *McCracken v. Hill*, 7 Ind. 30; *Wilshear v. Cottrell*, 1 El. & B. 672; *Raymond v. White*, 7 Cowen, 319; *Ex parte Scarth*, 1 Mont. D. & D. 240; *Tift v. Horton*, 53 N. Y. 377; 13 Am. Rep. 537; *Frankland v. Moulton*, 5 Wis. 1; *Voorhees v. McGinnis*, 48 N. Y. 278; *Gooding v. Riley*, 50 N. Y. 400; *Eastman v. Foster*, 8 Met. 19; *Farmers' Loan & Trust Co. v. St. Jo. Ry. Co.*, 3 Dill. 412; *Potts v. New Jersey Arms Co.*, 17 N. J. Eq. 395; *Ex parte Daglish*, Law R. 8 Ch. 1072; *Hawtry v. Butlin*, Law R. 8 Q. B. 290; *Meux v. Allen*, 23 Week. R. 526; *Branton v. Griffiths*, Law R. 1 Com. P. 349; *Mather v. Fraser*, 2 Kay & J. 536; *Begbie v. Fenwick*, Law R. 8 Ch. 1075, n; s. c. 24 L. T., N. S., 58; *Boyd v. Shorrocks*, Law R. 5 Eq. 72; *S. C.* 37 L. J. Ch. 144.

¹ *Wing v. Gay*, 36 Vt. 261, 268; *Dubois v. Kelly*, 10 Barb. 508. See in this connection, however, *Powers v. Dennison*, 30 Vt. 752; *Prince v. Case*, 10 Conn. 375; 27 Am. Dec. 675. And see *Slack v. Gay*, 22 La. Ann. 387.

² *Forbush v. Lombard*, 13 Met. 109; *Langworthy v. Coleman*, 18 Nev. 440; *Whitney v. Olney*, 3 Mason, 280; *Blake v. Clarke*, 6 Greenl. 436; 4 Cruise Dig. (Greenl. ed.) tit. 32, p. 21, § 40, n.

³ In *Johnson v. Rayner*, 6 Gray, 107, 110. In *Wooley v. Groton*, 2 Cush. 305, it is held that by the grant or exception in a deed of a "town pound," the land on which it stands is conveyed or excepted as a parcel, and not as an appurtenance.

contained in a deed. Thus, a person granted by deed to another a tract of land bounded on all sides by land of other persons named in the deed, but excepted from the operation of the deed "the mills and water privileges," then owned by the grantor. At the time of the execution of the deed there was about an acre of ground, lying common and unfenced as a millyard; this acre tract was used for the storage of timber, and for passing and repassing to and from the mills, and a portion of it was afterward used by the owners of the mills for a garden; the owners also used it as a site for buildings not connected with the mills. It was decided that the land which had been used for a garden and for such buildings was not included in the exception of the grantor's deed.¹ A deed which describes the northerly boundary of the premises conveyed as "four feet north from the northerly side of the building, now standing on said premises," includes the land on the northerly side of the building to the distance of four feet from the eaves, as the latter are the extreme part of the building.²

¹ *Forbush v. Lombard*, 13 Met. 109. Wilde, J., delivering the opinion of the court, said (p. 114): "We think the rule of construction is well established, that by the grant of a mill, the land under the mill and adjacent thereto, so far as necessary to its use, and commonly used with it, will pass by implication: *Blake v. Clark*, 6 Greenl. 436. And the same rule of construction applies to an exception in a grant. But to justify such an implication, it should be made to appear that the land adjacent was necessary for the use of the mill; and this was not proved at the trial. On the contrary, it was proved and admitted that the land claimed by the defendant as a mill yard has been used for purposes disconnected with the mills. A dwelling-house and barn have been erected thereon, and part thereof has been used as a barnyard, and for raising garden vegetables. And this action is brought for erecting three other small buildings within the limits of the millyard, so called, and continuing the same from the year 1839 to the day of the date of the writ. These facts are conclusive against the defendant's claim that the parts of the land thus used and occupied were necessary for the use of the mills. They cannot, therefore, pass as incident to a grant of the mills, or as parcel thereof. The land claimed was not fenced, nor was the mill-yard designated by any known bounds. Nothing more, therefore, can be included within the exception in the deed from Whitman to Hilton than was necessary for the use of the mills."

² *Millett v. Fowle*, 8 Cush. 150. The same ruling was made under a

§ 1202. **Agreement for removal.**—The parties may control by an agreement, as between themselves and those who have knowledge of it, the legal effect of attaching an improvement of a permanent character to the land.¹ But a parol agreement of this character will not bind a subsequent vendee who has no notice of it. Hence, where a fence is built by a person upon another's land, under a parol agreement that the builder might remove it at pleasure, it becomes a fixture which will pass with a conveyance of the land to a *bona fide* purchaser who has no notice of the adverse title to the fence.² And

lease where it was held that a lease of a "building" conveyed the land under the eaves, if the lessor owned the land: *Sherman v. Williams*, 113 Mass. 481; 18 Am. Rep. 522. In the latter case, Endicott, J., who delivered the opinion of the court, said: "The first question to be determined on this report is: Did the lease include the strip of land, ten inches wide, under the eaves in the rear of the brick building? Did it pass under the description, 'a certain brick building situated in said Boston, on Milk street, so called, and numbered 5, 7, and 9, on said street?' The strip ten inches wide was substantially covered by the eaves of the building, and was owned by the defendants. The well-settled rule that the grant of a house carries with it the title to all the land under the house which the grantor owns, extends to all the land covered or occupied by the house itself. As the eaves are a part of the building, the land under them is included in the description, when owned by the grantor. Where land is conveyed, bounded on a house as a monument, the land to the edge of the eaves only passes, that being the extreme part of the building; so where the house itself is granted or demised, the extreme parts of the house are the bounds and limits of the conveyance, and such title as the grantor has to the land thus occupied by the whole house passes by the grant or demise." See, also, *Carbrey v. Willis*, 7 Allen, 364; 83 Am. Dec. 688; *Gear v. Barnum*, 37 Conn. 229.

¹ See *Smith v. Waggoner*, 50 Wis. 155.

² *Rowand v. Anderson*, 33 Kan. 264; 52 Am. Rep. 529. See *Sampson v. Graham*, 96 Pa. St. 405. In *Rowand v. Anderson*, 33 Kan. 264, 267; 52 Am. Rep. 529, Johnston, J., in delivering the opinion of the court, said: "There is considerable disagreement in the decisions of the courts with respect to how far the doctrine of modifying the general law of fixtures, by agreement, may be carried. Some of the cases would seem to go to the extent of holding that parties may, by agreement, change the nature of property, and make that which would otherwise be a part of the realty, personal property, and that a purchaser of the realty would be bound by such agreement, even though he had no notice of the same. Others of them are to the effect that the distinctions between realty and personalty cannot be changed by the

the same principle, of course, applies to buildings and all other structures.¹ "The policy of our law," said Mr. Chief Justice Williams, of Connecticut, "is that titles to real estate shall appear upon record, so that all may, in this way, be informed where the legal estate is. But were this new mode of conveyance to prevail, encumbrances might frequently be found to exist, against which no vigilance could guard, no diligence protect. Our records would be fallacious guides, and when we had gained all the information they could give, we should remain in doubt as to the title. It is much better to leave those who had ventured to rely upon the word or honor of another to resort to that word or honor for their redress, than to suffer a person who had resorted to the official register to be defeated by secret claims of this kind. The law cannot prefer the claims of those who take no care of themselves, to those who have faithfully used all legal diligence. If a loss is to be sustained, it is more reasonable that he who has neglected the means the law put into his power should suffer, rather than he who has used those means."² Where a building has been erected upon the land of

mere agreement of the parties, and that a purchaser of real estate, in the absence of notice to the contrary, has a right to suppose that he takes with it every appurtenance which, under the general rules of law, passes with the grant of land, and that he cannot be affected by any secret claim or private agreement of which he has had no notice. It may be conceded that a party who, under a parol permission or license, places upon the land of another a permanent improvement, with the right, when he desires, to enter and take it therefrom, may exercise that right at any time before the permission or license is revoked by the landowner, and probably he has the right to enter to remove the fixture within a reasonable time after the revocation; and it would seem that any subsequent vendee who purchased the land with notice of such parol agreement or license, and of the interest of the parties in the fixture, would be bound by such agreement. But we think this doctrine cannot be carried to the extent of binding or affecting injuriously third parties to whom the land has been conveyed without reservation, and to whose notice the parol license had not been brought." See, also, *Walker v. Schindel*, 58 Md. 360.

¹ *Powers v. Dennison*, 30 Vt. 752; *Prince v. Case*, 10 Conn. 375; 27 Am. Dec. 675.

² In *Prince v. Case*, 10 Conn. 375; 27 Am. Dec. 675.

another, so as to become a fixture, with the understanding that the builder is to remove it upon receiving notice from the owner of the land, a subsequent mortgagee, having no notice of such understanding, is entitled, after a decree of foreclosure and entry, to possession of the premises, the building as well as to the land. An action of trespass may be maintained by him against the person erecting the building if he then remove it.¹

§ 1203. **Chattels not annexed to the realty.**—The general rule is that chattels which are not annexed to the freehold do not pass by a conveyance. An exception to this general rule is admitted in the case of articles which are constructively annexed, as doors, keys, locks, and windows of a house. "If there be anything well settled in the doctrine of fixtures, it is this: that to constitute a fixture, it is an essential requisite that the article be actually affixed or annexed to the realty. The term itself imports this."² Hence boards, rails, and bricks, cut and made from the soil of land belonging to the United States, do not pass to one who subsequently purchases the land from the government, although, at the time of the purchase, the several chattels are still upon the land.³ And so cordwood and other timber cut into merchantable form, remaining on public land at the time the patent therefor is issued, form personal property, and the patentee is not entitled to it.⁴ "A certificate of purchase or

¹ *Powers v. Dennison*, 30 Vt. 752. The possession of the party erecting the building is said not to be notice: *Prince v. Case*, 10 Conn. 375; 27 Am. Dec. 675.

² *Teaff v. Hewitt*, 1 Ohio St. 511; 59 Am. Dec. 634. It may, in certain cases, be left to the jury to determine whether certain articles actually form a part of the realty: *Leonard v. Stickney*, 131 Mass. 541.

³ *Carpenter v. Lewis*, 6 Ala. 682.

⁴ *Peck v. Brown*, 5 Nev. 81. Whitman, J., delivering the opinion of the court, said: "Unless the right to the timber cut passed to the respondent by his patent, he had none; and it could only pass as a fixture on or appurtenance to the realty; but timber felled by act of man, or wood cut, is personal property. Some of the decided cases go a great length in passing with the freehold what abstractly would be held personalty; perhaps none has further extended the rule or its application

patent vests in the patentee a title to the land, and generally all that is growing on, or is in the contemplation of law attached to the land, as houses, fences, growing timber, grain, etc; and it is said that fallen timber passes with the land. But that which has been severed from the land, and by the art and labor of man converted into personal property, such as implements of husbandry, barrels, furniture, or even rails when not put into a fence or evidently intended to be so used upon the land (which could not be inferred if made by a stranger), do not pass with it, any more than the grain, grass, or fruit, which has grown upon and been gathered from it.”¹

§ 1204. Same subject continued — Illustrations. —A deed will not convey as fixtures or appurtenances to the land, hewed timber and fence posts unattached to the soil, and oral evidence is inadmissible to show that it was the intention of the parties that the deed should embrace or pass the title to these articles.² Wood and

than *Farrar v. Stackpole*, 6 Me. 155; 19 Am. Dec. 201; and *Kittridge v. Woods*, 3 N. H. 503; 14 Am. Dec. 393. In the first of these cases, it was held that a mill chain, dogs, and bars in their appropriate places when the deed was made, the chain attached by a hook to a piece of draft chain, which was fastened to the shaft by a spike, passed under a deed conveying a sawmill with the privileges and appurtenances. This decision was based upon the principle ‘that certain things, personal in their nature, when fitted and prepared to be used with real estate, change their character and appertain to the realty, as an incident or accessory to its principal.’ In the second case cited under the same rule, it was held that certain heaps of manure passed by deed for the land as appurtenant, being intended to be used upon it, and for its benefit. In the present case, the timber and wood were cut expressly to be taken from the premises, and the rule of decision quoted has no application.”

¹ Chief Justice Wilson delivering the opinion of the court in *Wincher v. Shrewsbury*, 2 Scam. 283, 284; 35 Am. Dec. 108. See, also, *Woodruff v. Roberts*, 4 La. Ann. 127; *Robertson v. Phillips*, 3 Greene, G. 220.

² *Cook v. Whiting*, 16 Ill. 480. Scates, C. J., speaking for the court, said: “Viewing a vendee as one strictly protected in regard to things actually annexed or attached to, and in regard to things not fully severed from, the freehold, we should give him all that in law belongs to the land, under the terms and description in his deed. But after doing this in its most extended sense, we are not able to include these hewed timbers, posts, and round logs, lying loosely about upon the land, although originally provided and intended for a granary on the land, as fixtures becoming

timber cut down before a sale of the land becomes personal property, and hence, being severed from the inheritance, does not pass to the purchaser.¹ A rough split stone brought from a distance and placed in a dooryard for the purpose of being used at some future time as a doorstep, but not placed in position or used as such, is a chattel, and not a fixture.²

part of it. In *Wincher v. Shrewsbury*, 2 Scam. 283, 35 Am. Dec. 108, this court held that rails made upon Congress land and piled, would not pass to the purchaser by the usual description of land, although the act of severance might have been a trespass. I know that this subject is full of difficulty; and a question respecting such timber as may have been severed from the land by storms, decay, and accidents, will deserve serious consideration when presented. But here the separation by the act of the owner was complete, and he had unquestionably converted it into personalty, though with the intention of reannexing it to the freehold at a future time. But before this was done he sold his land and conveyed it, not only by the usual terms, but by a general description which included in its boundaries more than he intended to convey, and from which he reserved or excluded a part by specified boundaries. We cannot from this particularity found in the deed, suppose any more intended than is provided for in it, and fixtures will not include these articles as part of the description of land, tenements, or hereditaments appertaining thereto. But it is now insisted upon and claimed to be included under 'appurtenances' within the true intent of the deed. 'This term, both in common parlance and in legal acceptance, is used to signify something appertaining to another thing as principal, and which passes as an incident to the principal thing. Lord Coke says (Co. Lit. 121 b) a thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal.' *Harris et al. v. Elliott*, 10 Peters, 53, 54; *Leonard v. White*, 7 Mass. 6-8; 5 Am. Dec. 19. See, also, *Jackson v. Hathaway*, 15 Johns. 454; 8 Am. Dec. 263. So these materials cannot pass under the term 'appurtenances.'"

¹ *Crouch v. Smith*, 1 Md. Ch. 401.

² *Woodman v. Pease*, 17 N. H. 282. Woods, J., said: "The term 'fixture' may embrace other things than such as are denoted by the word in its strict etymological sense; and whatever has been placed upon the soil, or upon a building for the purpose of being used as a part of the realty, may properly fall under the denomination of a fixture, although not so attached to it that it cannot be severed without disturbing or breaking the soil. But a chattel that is fit to be annexed to the freehold, and has been brought upon it with an intention on the part of the possessor to annex it, does not become a fixture unless actually annexed or placed in the position in which it was intended to be used, and in which it is adapted for use. These principles are so obvious, and admit of illustration so diversified and so familiar, that it is unnecessary to adduce authority or argument to sustain them. Their application to this case

§ 1205. **Use on the land.**—The same principles that apply to timber and fence rails when severed from the freehold, also govern, when the question concerns a stone split out and slightly removed, and laid up for the purpose, and with the intention by the owners of the farm upon which it was quarried and left standing, of using it in the construction of a tomb elsewhere; such a stone would not pass by a deed of the farm. The rule with respect to chattels of this character is, that if they are intended for use on the land on which they lie, they pass by a deed of the realty; but if they are intended for use elsewhere, they do not pass by virtue of the deed.¹ As illustrating the proposition that a chattel cannot be converted into realty except by attaching it to real estate so as to make it a fixture, and if it is not annexed in this mode, it retains its character as personalty, we may cite a case where this rule was applied with reference to a sawmill built upon timbers, lying upon the surface of the ground, erected for the purpose of sawing timber within a convenient distance, and then intended to be removed to another place. As the sawmill was not connected with the freehold, nor essential to its full enjoyment, it could be regarded in no

is very plain. The stone was brought into the yard by Peabody, for the purpose of being devoted at a future time to the finishing of the house which he had built. He intended to annex it to the house and to make it a part of it. In that respect it was like bricks, lime, lumber, or other materials to be used in building. So long as they remain unannexed to the house, they continue to be chattels; and assume the character of the realty and become assimilated with the land, by the process, whatever it may be, which prepares them for and places them in their positions to be used and enjoyed with the structure or with the soil. This stone was fit to be made a doorstep. It was carried there for the purpose of being placed where it might serve as such, and by such position and adaptation for use, become parcel of the house itself. But that plan was never executed, and the stone remained a chattel, and did not become a fixture in any sense."

¹ Noble v. Sylvester, 42 Vt. 146. It was held that as there was nothing about the stone or its position to indicate the use to which it was to be put, this was a proper subject of explanation between the seller and purchaser at the time the deed was executed, and such explanation, though accompanied by a formal parol exception of the stone, which was unnecessary, might be by parol.

other light than a mere personal chattel, and would not be transferred by a conveyance or patent of the land.¹ A mill and gin stand not attached to the soil except by its own weight, though it may be used for the purposes of a farm, is not a part of the realty; nor is a bell used for farm purposes, where it is set upon posts only, and is not permanently annexed to the soil.²

¹ *Brown v. Little*, 6 Nev. 244. Lewis, C. J., speaking for the court, said (p. 251): "We know of no method of converting a personal chattel into real estate, or giving it the character of realty, except by making it a fixture; and if it be not so attached as to become a future, it retains its character of personalty entirely unmodified or affected by its situation. That an erection of any kind placed on the land, but not annexed or fastened to, or imbedded in the soil, and not intended to be permanent, or left indefinitely thereon, cannot be deemed a fixture, is a proposition, we think, fully warranted by almost the entire weight of decisions; and if not a fixture, we are authorized in concluding that it is a personal chattel merely, and must be regulated by the law governing that class of property."

² *Cole v. Roach*, 37 Tex. 412. The case was reversed upon another point, but the court observed that these articles were not a part of the real estate. With reference to a cistern set upon blocks by the house to catch water, the court, per Ogden, J., observed (p. 418): "In a suit by the heir against the administrator, a cistern sitting against the wall was held in Massachusetts to be a fixture, and a part of the realty; but as between a landlord and a tenant, it has been often held by the courts to be a personal chattel, subject to removal by the tenant. We have found no case deciding the question when raised as between the vendor and vendee of realty; but we are inclined to the opinion that in this country where, in many instances, cisterns are used as a substitute for wells, and where a house or farm without a cistern attached would often be considered almost uninhabitable, where a cistern has been placed against the house for the purpose of supplying the inmates with water, and has been used and depended upon for that purpose, it should be considered a part of the realty as much as the key to the door, or the fence around the yard or field. It has become a necessity to the farm or dwelling, and should pass with it."

In *Winslow v. Merchants' Insurance Co.*, 4 Met. 306, 38 Am. Dec. 368, Chief Justice Shaw, delivering the opinion of the court, to the effect that a steam-engine, boilers, and machinery placed in a building intended for the manufacture of steam-engines, are fixtures, says, however (p. 314): "As to what shall be deemed fixtures and part of the realty, when the question does not arise as between landlord and tenant, or tenant for life and remainderman, in regard to improvements made by the tenant, it is difficult to lay down any general rule which shall constitute a criterion. The rule that objects must be actually and firmly affixed to the freehold to become realty, or otherwise to be considered personalty,

§ 1206. **Temporary removal.**—Mr. Justice Cowan, after adverting to the general rule that anything of a personal nature, not attached to the freehold, cannot be considered as an incident to the land, even in a case between vendor and vendee, observes: "I have said that as a general rule they cannot be considered an incident unless they are affixed. This is not universally so. A temporary dis-annexing and removal, as of a millstone to be picked, or an anvil to be repaired, will not take away its character as a part of the freehold. Locks and keys are also considered as constructively annexed; and, in this country, it must be so with many other things which are essential to the use of the premises. Our ordinary farm fences of rails, and even stone walls, are affixed to the premises in no other sense than by the power of gravitation. It is the same with many other erections of the lighter kind about a farm. I shall hereafter have occasion to notice these, and a few other like instances of constructive fixtures. I admit that some of the cases are quite too strict against the purchaser; but as far as I have looked into them, and I have examined a good many, both English and Ameri-

is far from constituting such criterion. Doors, window blinds, and shutters, capable of being removed without the slightest damage to a house, and even though at the time of a conveyance, an attachment, or a mortgage, actually detached, would be deemed, we suppose, a part of the house, and pass with it. And so, we presume, mirrors, wardrobes, and other heavy articles of furniture, though fastened to the walls by screws with considerable firmness, must be regarded as chattels. The difficulty is somewhat increased when the question arises in respect to a mill or manufactory, where the parts are often so arranged and adapted, so ingeniously combined as to be occasionally connected or disengaged, as the objects to be accomplished may require. In general terms, we think it may be said that when a building is erected as a mill, and the water works or steam works which are relied upon to move the mill are erected at the same time, and the works to be driven by it are essential parts of the mill, adapted to be used in it and with it, though not at the time of the conveyance, attachment, or mortgage, attached to the mill, are yet parts of it, and pass with it by a conveyance, mortgage, or attachment: *Powell v. Monson & Brimfield Mfg. Co.*, 3 Mason, 466; *Farrar v. Stackpole*, 6 Greenl. 154; 19 Am. Dec. 201; *Gray v. Holdship*, 17 Serg. & R. 415; 17 Am. Dec. 680; *Voorhees v. Freeman*, 2 Watts & S. 116; 37 Am. Dec. 490." See as to rails and bricks, *Thweat v. Stamps*, 67 Ala. 96.

can, they are almost uniformly hostile to the idea of mere loose, movable machinery, even where it is the main agent or principal thing in prosecuting the business to which a freehold property is adapted, being considered as a part of that freehold for any purpose. To make it a fixture, it must not only be essential to the business of the erection, but it must be *attached to it* in some way; at least, it must be mechanically fitted, so as in ordinary understanding to make a part of the building itself."¹ In an

¹ In *Walker v. Sherman*, 20 Wend. 636; 639. With reference to fixtures of various kinds, see *Re Dawson, Jr.* Law R. 2 Eq. 218; *Rogers v. Brokaw*, 25 N. J. Eq. 496; *Baker v. Davis*, 19 N. H. 325, 332; *Hutchinson v. Kay*, 23 Beav. 413; *Gale v. Ward*, 14 Mass. 352; 7 Am. Dec. 223; *Swift v. Thompson*, 9 Conn. 63; 21 Am. Dec. 718; *Pierce v. George*, 108 Mass. 78; 11 Am. Rep. 310; *Tobias v. Francis*, 3 Vt. 425; 23 Am. Dec. 217; *Longbottom v. Berry*, Law R. 5 Q. B. 123; s. c. 39 Law J. (N. S.) Q. B. 37; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; 37 Am. Dec. 203; *Taffe v. Warnick*, 3 Blackf. 111; 23 Am. Dec. 383. In *Tobias v. Francis*, *supra*, the owner of a wool-carding factory conveyed it with all the machinery. He took from the vendee a mortgage deed, at the same time, of the same property, for the purpose of securing the payment of the purchase money. The vendee entered, took, and retained possession. It was connected with the building in which it was worked by a band only, but it might be removed from the building without being first taken in pieces. Change of possession being necessary to the validity of a chattel mortgage, it was held that the machinery was personal property, and notwithstanding the mortgage, was liable to attachment at the suit of any creditor of the vendee. *Gale v. Ward*, *supra*, was a similar case. P. and D. Brigham, the owners, conveyed the land "having a wool-carding factory, and the appurtenances for carrying on the same, which are comprised in this grant," to one Beaton. Beaton at the same time gave to the Brighams a mortgage by like description, as security for the payment of the purchase money. Beaton also at the same time gave to the Brighams a lease of the premises, by a like description for a term exceeding a year. The carding machines were seized by the sheriff by virtue of an execution against Beaton who was in possession. The reporter thus described the machines: "The said three carding machines stood on the floor of the said factory building, not nailed to the floor, nor in any manner attached or annexed to the building, unless it was by the leather band, which passed over the wheel or pulley, as it is called, to give motion to the machines. This band might be slipped off the pulley by hand, and it was taken off and the machines removed from time to time, when they were repaired. Each machine was so heavy as to require four men to move it on the floor, and was too large to be taken out at the door; but it was so constructed as to be easily unscrewed and taken in pieces, and the machines were so taken

early case in Maryland, it was held, upon a sale of a distillery and improvements upon execution, that the sheriff's deed passed the pumps, cistern, door, and iron grating connected with the property, but did not convey the joists, buckets, pickets, and faucets not affixed to the freehold.¹ Where the deed was silent on the subject, bricks in the kiln on a plantation were held in Louisiana not to pass to the purchaser by a sale of the land; and, accordingly, where the purchaser had knowledge at the time the conveyance was made, that the bricks had been previously sold by the vendor to another person, the purchaser was held liable to the latter for their value, for a conversion of them to his own use.² The doctrine that physical annexation is essential to constitute an article a part of the realty is widely disapproved, and in some States entirely rejected.³

in pieces when removed by the deputy sheriff." The court held that the machines were personal property and liable to attachment by the mortgagor's creditors, the mortgagees not being in possession. The law of this case was questioned in *Kittridge v. Woods*, 3 N. H. 506; 14 Am. Dec. 393. But in *Baker v. Davis*, *supra*, it was held that "carding machines, which were fastened to the floor by nails through the legs, and operated by a band around a drum, in a room below, and through two holes in the floor, and then around a wheel, which was a part of the machines, which band could not be taken off without cutting or ripping it apart, it being impossible to get the machines out of the building, and a picker, which was nailed strongly to the building and operated by a band, and a kettle set in a brick arch, and a clothier's press, which was an iron plate, fixed in a brick arch, on each side of which were two posts, with a beam and screw, framed and fitted into the building, the press not being any more easily moved than a part of the building, are fixtures, and pass by the extent of an execution upon the land."

¹ *Kirwan v. Latour*, 1 Har. & J. 289; 2 Am. Dec. 519. In *McClintock v. Graham*, 3 McCord. 553, it was intimated, the case being decided on another point, that a still fixed in a rock furnace built against the wall of a house, for the purpose of distilling, is not a fixture which would pass by a sheriff's sale of the land; because, in the language of the court, "it is susceptible of being removed without any injury whatever to the freehold, or any part thereof; and even without disfiguring the premises, which it seems is sometimes made the criterion, and without digging up the soil."

² *East v. Ealer*, 24 La. Ann. 129. See, also, *Nimmo v. Allen*, 2 La. Ann. 451; *Key v. Woolfolk*, 6 Rob. (La.) 424.

³ *Patterson v. Delaware Co.*, 70 Pa. St. 381, 385; *Christian v. Dripps*, 28 Pa. St. 271; *Seeger v. Pettit*, 77 Pa. St. 437; 18 Am. Rep. 452; s. c. Alb. L. J. 151; *Hill v. Sewald*, 53 Pa. St. 271; 91 Am. Dec. 209; *Deal v.*

§ 1207. **Articles constructively annexed.**—It is not necessary, in order that a deed may pass fixtures, that articles claimed as such should be actually annexed to the freehold. It is well settled that if they are constructively annexed, they, by virtue of the deed, go with the realty. In a case where hop-poles which were taken down and piled in the yard, but intended for use again in the season of hop raising, were held to be a part of the real estate and to pass by a deed, Gardiner, Chief Justice, said: "The root of the hop is perennial, continuing for a series of years. That this root would pass to a purchaser of the real estate, there can be no question. The hop-pole is indispensable to the proper cultivation of this crop. It is distinctly averred and admitted that the poles belonged to the yard upon these premises, that they were used for the purposes of cultivation, and were removed from the place where they were set, in the usual course of agriculture, with a view to gather the crop, and without any design to sever them from the freehold; but, on the contrary, with the purpose of replacing them, as the exigency of the new growth required. In a word, they were to be permanently used upon the land, and were necessary for its proper improvement. If the poles had been standing in the yard at the time of the sale, all admit that they would have formed a part of the realty. But by being placed in heaps for a temporary purpose, they would not lose their distinctive character as appurtenant to the land, any more than rails or boards from a fence in the same condition would become personal property."¹ A conveyance of

Palmer, 72 N. C. 582; Fisher v. Dixon, 12 Clark & 312; Bryan v. Lawrence, 5 Jones (N. C.), 337; Palmer v. Forbes, 23 Ill. 301, 313; Latham v. Blakely, 70 N. C. 368; Huebschmann v. McHenry, 29 Wis. 655. And see, Gray v. Holdship, 17 Serg. & R. 413; 17 Am. Dec. 680; Cole v. Roach, 37 Tex. 413, 419; Hunt v. Bullock, 23 Ill. 320; Hoyle v. Plattsburg etc. R. R. Co., 51 Barb. 62; s. c. 54 N. Y. 314; 13 Am. Rep. 595; Minnesota Co. v. St. Paul Co., 2 Wall. 609.

¹ Bishop v. Bishop, 11 N. Y. (1 Kern.) 123, 124; 62 Am. Dec. 68. Denio, J., dissented, and in his dissenting opinion remarked: "We are allowed

the land, it has been held, will carry with it rough planks laid down, and used as the upper floor of a gin-house.¹ In a case in Vermont there were double windows made for a house, and fitted to its window casings. They, however, were not nailed or fastened, but were held in place by being closely fitted and pushed in, in which condition they remained through one winter, and in summer were taken out and placed in another portion of the house; there were also blinds intended for sidelights, and set up in the hall, but never fitted to the windows or put in. It was not the intention of the grantor that either the windows or blinds should pass with the house, but he secreted them, so that the grantee had no knowledge of their existence at the time of the sale, and there were no indications about the casings that any double windows

to know judicially what every person out of court knows, that hop-poles are not permanently attached to the land. The cultivator provides himself with a supply of them, and when the root of the hop, which is perennial, shoots forth in the spring, these poles are set up perpendicularly in the earth for the vine to entwine itself around. When the crop is mature, the poles are taken down and stripped of their burthen, and set up in stacks, to be again used in the same manner the next year. The question is, whether this is such an affixing to the land, as to change the character of the poles from that of personal property, which they bore when brought into the field, into real estate. To convert personal chattels into real property by force of the law of the fixtures, there must, in general, be a permanent corporeal annexation of the chattel to the land, or to something which is itself annexed to the land. Without going over the cases, which were numerous, and were elaborately reviewed by the late Justice Cowen, in giving the opinion of the supreme court in *Walker v. Sherman*, 20 Wend. 636, I am satisfied with the conclusion at which that court arrived, that nothing of a nature personal in itself will pass by a conveyance of the land, unless it be brought within the denomination of a fixture by being in some way permanently, at least habitually, attached to the land, or some building upon it."

¹ *Bryan v. Lawrence*, 5 Jones (N. C.), 337. As to doors and windows, see *State v. Elliott*, 11 N. H. 540; *Pettengill v. Evans*, 5 N. H. 54. Rails and fences are fixtures, and pass with the land: *Mitchell v. Billingsley*, 17 Ala. 391; *Seymour v. Watson*, 5 Blackf. 555; 36 Am. Dec. 556; *Sawyer v. Twiss*, 26 N. H. 348; *Burelson v. Teeple*, 2 Greene, G. 542; *Glidden v. Bennett*, 43 N. H. 306. See, also, *Collins v. Bartlett*, 44 Cal. 371; *Patton v. Moore*, 16 W. Va. 428; 37 Am. Rep. 789; *Goodrich v. Jones*, 2 Hill, 142; *Smith v. Odom*, 63 Ga. 499; *Climmer v. Wallace*, 28 Mo. 556; 75 Am. Dec. 135. But see *Pennybecker v. McDougal*, 48 Cal. 160.

belonged to them. The court held that, as the windows and blinds were never actually or constructively annexed to the house, they did not pass by a deed of the realty.¹ Unattached scantling, which, at the time of the execution of the deed was partly piled up in the barn, and

¹ *Peck v. Batchelder*, 40 Vt. 233; 94 Am. Dec. 392. Wilson, J., in delivering the opinion of the court, remarked: "In order to entitle the plaintiff to recover, it was incumbent on him to show that the windows or blinds had become, and were, a part of the building conveyed to him by the defendant. . . . It appears the defendant owned the blinds and windows in question at the time he conveyed the house to the plaintiff; and if they had become, and were at that time, a part of the house conveyed, the fact that the defendant secreted them previous to the conveyance, or that the plaintiff had, at the time of the conveyance, no knowledge of their existence, would not defeat the plaintiff's right to the property. In the construction of a building, its doors, windows, blinds, shutters, etc., become a part of the building, and the manner of annexation is of no particular importance. There must be actual or constructive annexation in order to make them a part of the building. At the time the defendant conveyed to the plaintiff, the building had in it all the windows it was constructed with or for, and the mere fact that the defendant had made some sash, painted them, and set glass in them, intending to use them at some future time, in the construction of double windows for the house, does not constitute even constructive annexation. In order to make such windows a part of the realty, they must have been so annexed or attached to, or used upon the building, as to indicate that the owner intended by such annexation or use to make them a part of the building. The window frames and casings of the house were not constructed for double windows, and the referee has not found that the defendant had prepared even the ordinary stops by which double windows could have been permanently attached to the house, or securely kept in place. It is evident from the manner in which these windows were put in that, if they had been taken out and put back a few times, they would have become loose and have fallen off, unless they had been in some way fastened to the building. The very manner in which the defendant put these windows in, and temporarily used them, shows that he did not intend, by such act or use, to make them a part of the building. The referee finds that the defendant did not intend these windows or blinds should pass with the house. The plaintiff, in the purchase of the house, was not deceived in respect to the windows or blinds. There was nothing upon the house, or windows attached to it, indicating that double windows or blinds had been attached to the building, or that such windows and blinds belonged to the house. The plaintiff, at the time of the conveyance, had no knowledge or information that double windows or blinds had been attached to the building, or made for that purpose; there is, therefore, no ground to claim that the price paid for the property was in any way affected in faith of double windows or blinds."

partly used as a scaffolding for straw, and which had been used to hang tobacco on for curing, in a barn erected on a farm where tobacco had been cultivated, the scantling being put up and taken down as the drying of the tobacco required, it was held, did not pass as fixtures by a deed of the farm.¹ It is not necessary that machinery should be actually annexed to the freehold to pass by a deed of the latter. If it is a constituent part of the manufactory, adapted to the purposes for which the building was erected, it will pass by a deed of the freehold although not actually fastened to it.² In fact, all articles which are constructively annexed to the freehold, though they may not be actually annexed, such as keys, doors, and windows, pass by the deed.³ The general principle seems to be that all articles that may properly be considered as belonging to the real estate, necessary to its use and enjoyment, whether firmly fixed or temporarily detached, or from their nature only constructively annexed, pass by a deed of the land.

¹ *Noyes v. Terry*, 1 Lans. 219.

² *Voorhis v. Freeman*, 2 Watts & S. 116; 37 Am. Dec. 490. See, also, as to other cases of constructive annexation, *Metropolitan etc. Society v. Brown*, 26 Beav. 454; *Pyle v. Pennock*, 2 Watts & S. 390; 37 Am. Dec. 517; *Ex parte Astbury*, Law R. 4 Ch. 630; *Place v. Fagg*, 4 Man. & R. 277; *Walmsley v. Milne*, 7 Com. B., N. S., 115; *Johnson v. Mehaffey*, 43 Pa. St. 308; 82 Am. Dec. 568; *Burnside v. Twitchell*, 43 N. H. 390; *Cole v. Roach*, 37 Tex. 413; *Rufford v. Bishop*, 5 Russ. 346; s. c. Law J. Ch. 108, 114; *Conklin v. Parsons*, 1 Chand. 240; s. c. 2 Pinn. 264; *Ripley v. Paige*, 12 Vt. 353. In *Ropps v. Barker*, 4 Pick. 238, it was held that if A grants a part of a lot to B, bounding such part on a straight line, between two monuments, taking a stipulation that a fence standing partly on the line and partly on the land conveyed shall remain the property of the grantor, and if A subsequently grants the rest of the lot to C, bounding it on the same straight line, no right passes to C in that part of the fence which stood on the land of B.

As to whether a ferryboat, chain, and buoys are fixtures, see *Cowart v. Cowart*, 3 Lea (Tenn.), 57.

³ *Petengill v. Evans*, 5 N. H. 54; *Mitchell v. Billingsley*, 17 Ala. 391; *Seymour v. Watson*, 5 Blackf. 555; 36 Am. Dec. 556; *State v. Elliott*, 11 N. H. 540. And see, also, *Walmsley v. Milne*, 7 Com. B., N. S., 115; 6 Jur., N. S., 125; 29 Law J. Com. P. 97; 1 Law T., N. S., 62; 8 Am. Law Reg. 373; *Burleson v. Teeple*, 2 Greene, G. 540; *Sawyer v. Twiss*, 26 N. H. 348; *Conklin v. Parsons*, 1 Chand. 240; 2 Pinn. 264; *Ripley v.*

§ 1208. **Machinery in mills.**— Upon the question whether machinery in mills will pass by a deed of the premises, there is perhaps an irreconcilable conflict in the authorities. The law may be stated with a reasonable degree of certainty up to a certain point, and then, beyond that, all becomes confusion.¹ In accordance with the general rule, that, as between grantor and grantee, the firm and substantial annexation to the freehold by the owner of articles intended for the use of the realty and requisite to its enjoyment, constitutes them fixtures, which pass by a conveyance of the land, it is generally agreed that machinery which is permanently attached to the realty, such as boilers, steam-engines, and gearing, are parcels of the realty, and will pass to the purchaser by a deed of the land.² This question frequently arises between mortgagor and mortgagee. In these cases, as we have seen, the same rules apply as would if the controversy were between vendor and vendee.

Paige, 12 Vt. 353; Voorhis v. Freeman, 2 Watts & S. 116; 37 Am. Dec. 490; Society v. Brown, 26 Beav. 454; Peck v. Batchelder, 40 Vt. 233; 94 Am. Dec. 392; Liford's case, 11 Co. Rep. 50*b*; Place v. Fagg, 4 Man. & R. 277; 7 Law J. K. B. 195; Wood v. Bell, 6 El. & B. 355; Bryan v. Lawrence, 5 Jones (N. C.), 337; Bishop v. Bishop, 11 N. Y. 123; 62 Am. Dec. 68; Goodrich v. Jones, 2 Hill, 142; Glidden v. Bennett, 43 N. H. 306.

¹ Sweetzer v. Jones, 35 Vt. 317; 82 Am. Dec. 639; Green v. Phillips, 26 Gratt. 752; 21 Am. Rep. 323; Brennan v. Whitaker, 15 Ohio St. 446; Crane v. Brigham, 11 N. J. Eq. 29, 36; Climie v. Wood, Law R. 3 Ex. 257; s. c. Law R. 4 Ex. 328; Sands v. Pfeiffer, 10 Cal. 258. See McKiernan v. Hesse, 51 Cal. 594; Taylor v. Collins, 51 Wis. 123.

² Longbottom v. Berry, Law R. 5 Q. B. 123; s. c. 39 Law J., N. S., Q. B. 37, 45; Roberts v. Dauphin etc. Bank, 19 Pa. St. 71; McKim v. Mason, 3 Md. Ch. 186; Allison v. McCune, 15 Ohio, 726; 45 Am. Dec. 605; Teaff v. Hewitt, 1 Ohio St. 511; 59 Am. Dec. 634; Harris v. Haynes, 34 Vt. 220; Oves v. Ogelsby, 7 Watts, 106; Sparks v. State Bank, 7 Blackf. 469; In re McKibbin, 4 Ir. Ch. 520. See March v. McKoy, 56 Cal. 85; Lyle v. Palmer, 42 Mich. 314; Helm v. Gilroy, 20 Or. 517; Southbridge Savings Bank v. Gibson, 147 Mass. 500; Hopewell Mills v. Taunton Sav. Bank, 150 Mass. 519; 15 Am. St. Rep. 235; Farmers' Loan & T. Co. v. Minneapolis Engine Works, 35 Minn. 543; Lyle v. Palmer, 42 Mich. 314; McFadden v. Crawford, 36 W. Va. 671; 32 Am. St. Rep. 891; Morris' Appeal, 88 Pa. St. 368; Roddy v. Brick, 42 N. J. Eq. 218; Green v. Phillips, 26 Gratt. 752; 21 Am. Rep. 523; Patton v. Moore, 16 W. Va. 428; 37 Am. Rep. 789; Langdon v. Buchanan, 62 N. H. 657; Stillman v. Flenniken, 58 Iowa, 450; 43 Am. Rep. 120.

§ 1209. **Removal without injury.**—A distinction is sometimes made between the fixtures placed in a mill which are indispensable to its operation as such, and those which are used temporarily or for particular classes of work. The former may pass by a conveyance or mortgage where the latter would not.¹ In some courts the rule has been announced that when an article can be removed without material damage to the freehold or the article itself, it is a chattel, and if this is not capable of being done, it is a fixture. "The rule of the common law, as we understand and adopt it, may be summed up in a single sentence, and it is this: Wherever the article can be removed without essential injury to the freehold or the article itself, it is a chattel; otherwise, it is a fixture. This rule is recommended by its simplicity and definiteness. Depart from it, and we are at sea, without chart or compass. This rule, of course, may be controlled by the agreement of the parties, as well as by established usage or custom. And most of the exceptional cases to the foregoing rule, and which seem to conflict with it, will be found to arrange themselves under one of these heads."² The owner of a sash and blind factory purchased a molding machine and a planing machine, placing them on the main floor of the building; for greater firmness one was

¹ *Morris' Appeal*, 88 Pa. St. 368; *Keeler v. Keeler*, 31 N. J. Eq. 181; *Farrar v. Chauffetete*, 5 Denio, 527; *Ferris v. Quimby*, 41 Mich. 202; *Smith Paper Co. v. Servin*, 130 Mass. 511; *Shelton v. Ficklin*, 32 Gratt. 727; *Robertson v. Corsett*, 39 Mich. 777; *McConnell v. Blood*, 123 Mass. 47; 25 Am. Rep. 12; *Southbridge etc. Bank v. Exeter Machine Works*, 127 Mass. 542; *Taylor v. Collins*, 51 Wis. 123; *McFadden v. Crawford*, 36 W. Va. 671; 32 Am. St. Rep. 894; *Green v. Phillips*, 26 Gratt. 752; 21 Am. Rep. 323; *Patton v. Moore*, 16 W. Va. 428; 37 Am. Rep. 789; *Roddy v. Brick*, 42 N. J. Eq. 218; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57; 24 Am. Rep. 719; *Langdon v. Buchanan*, 62 N. H. 257; *Hill v. National Bank*, 97 U. S. 450; *Calumet Iron & Steel Co. v. Lathrop*, 36 Ill. App. 249.

² *Wade v. Johnston*, 25 Ga. 331, 336, per Lumpkin, J., delivering the opinion of the court. See *Harris v. Haynes*, 34 Vt. 220; *Hunt v. Mulvanphy*, 1 Mo. 508; 14 Am. Dec. 300; *Hill v. Wentworth*, 28 Vt. 428; *Graves v. Pierce*, 53 Mo. 429; *Fullam v. Stearns*, 30 Vt. 443; *Sweetzer v. Jones*, 35 Vt. 317; 82 Am. Dec. 639; *Bartlett v. Wood*, 32 Vt. 372.

bolted to the floor; and the weight of the other was sufficient to cause it to stand without fastening; he executed a mortgage upon the real estate, including the building containing the machines, and subsequently executed a chattel mortgage upon the machines; and machines were held not to be fixtures which the mortgage upon the realty covered, but chattels embraced by the chattel mortgage. Mr. Justice Knapp observed: "They had no such attachment or physical annexation to the freehold, or anything appurtenant to the lands, as could impart to them the character of real estate; nor is there any evidence in the case of an intention of the parties to join them permanently to the freehold. They stood upon the floor of the building, in which they were used, without any other support, and without any manner of fastening to the floor, walls, or other part of the building, except that one being lighter than the other, was partially secured to the floor by screw bolts; and as to that, the evidence fully justifies the conclusion of the vice-chancellor, that the bolts placed in the soles of that machine were put there solely for convenience in its use, to render it more steady when in motion. The belts which were run between the fixed shafting and the machines were only for the purpose of communicating with the driving power and giving motion; their office is not, nor can they serve to annex and fix the machines to the real estate. It is true, that if the chattel is actually affixed to the realty, the strength and force of the union is of little consequence in determining its character as a fixture, but to create it a fixture, there must be annexation, and the connection must be such as is consistent with and suggestive of an intent permanently to annex it to the freehold. . . . There appears to have been no special adaptation of this machinery to the place where used, nor any preparation of the place to receive them. They were suitable and proper to be there, if such instruments were required for their appropriate work, but equally suitable and useful elsewhere. They were movable in the building, and were

moved about at the convenience of the owner, and run from different parts of the shafting. They were made and designed, not for this place, or any particular place; they were constructed after fixed patterns, for all purchasers; things in gross; mere implements; heavy and complicated tools. If they ceased to be used in this factory, they were movable without alteration, without detriment to the building, and could be used equally well in another place provided with power to drive them.”¹

¹ *Blancke v. Rogers*, 26 N. J. Eq. (11 Green, C. E.) 563, 568. In *Keeler v. Keeler*, 31 N. J. Eq. (4 Stewt.) 181, the court say (p. 190): “The machinery and apparatus for furnishing motive power, light, and warmth to the buildings, are in this case part of the realty. The steam-engine is securely and permanently bolted to a foundation set eight or ten feet deep in the ground, and it was put in for permanent use. It, with its appurtenances, is part of the realty, and so are the boilers which are a necessary adjunct to it, also the shafting, belting, couplings, and pulleys to communicate the power, and also the waterwheels and waterwheel governor: *Crane v. Brigham*, 3 Stockt. Ch. 29; *Quinby v. Manhattan Cloth Co.*, 9 Green, C. E. 260; *Keve v. Paxton*, 11 Green, C. E. 107; *Fish v. Waterproof Paper Co.*, 2 Stewt. 16; s. c. on appeal, *sub nom. McMillan v. Fish*, 2 Stewt. 610; *Watson v. Watson Mfg. Co.*, 3 Stewt. 483. The apparatus for the manufacture of gas (called a generator), is situated in a pit made expressly for it in a small building built for it a short distance from the main building. It is connected with a gas-pump in the building. and the pipes are attached to the beams and girders by hooks, and in some places pass through holes in the side walls, bored for the purpose. The generator and its appurtenances and the pipes are fixtures: *Hays v. Doane*, 3 Stockt. Ch. 84, 96; *Ewell on Fixtures*, 299; *Regina v. Lee*, Law R. 1 Q. B. 242. The gasburners are of the same character in this case. They are in no sense furniture, but are mere accessories to the mill: *Sewell v. Angerstein*, 18 L. T., N. S., 300. Some of the heating pipes are laid on hooks attached to boards which are fastened to the walls. They may be removed without disturbing the boards or hooks. In one place there are two nests of piping which rest on the floor without being attached to it. Such pipes so attached for heating purposes were, under like circumstances, held to be fixtures in *Quinby v. Manhattan Cloth Co.*, 9 Green, C. E. 260. See, also, *Phillbrick v. Ewing*, 97 Mass. 133, and *Stockwell v. Campbell*, 39 Conn. 362; 12 Am. Rep. 393. Those which rest on the floor are not to be excepted under the circumstances. They are part of the system of piping in the building. The rest of the property mentioned in the complainant’s mortgages is personal. The Danforth cap spinning-frames, Danforth cap twisting-frames, the ring and traveler twisting-frames, balling machines, carding machines, grinding machines, drawing frames; Higgins or jack fly-frames, Higgin’s slubber, counter twist-speeders, mules, and other ma-

§ 1210. **Comments.**—While some courts recognize the test of removal without injury as being the proper one, the doctrine is not sustained by the great weight of recent authority. As has been repeatedly said, it is impossible to lay down any rule with which cases may not be found in conflict, but it is believed that the correct rule is stated with as great certainty as the nature of the subject admits in the following section.

§ 1211. **Proper test for considering machinery as fixtures.**—Perhaps the only rule that can be evolved from the mass of conflicting decisions is, that whether an article is a fixture or not must depend upon the combination of several tests, any one of which alone is not conclusive. In a case which is frequently cited, Chief Justice Bartlett says: "From the examination which I have been enabled to give to this subject, and after a careful review of the authorities, I have reached the conclusion that the united application of the following requisites will be found the safest criterion of a fixture. (1) Actual annexation to the realty, or something appurtenant thereto. (2) Appropriation to the use or purpose of that part of the realty with which it is connected. (3) The intention of the party making the annexation, to make the article a permanent accession to the freehold, this intention being inferred from the *nature* of the article affixed, the *relation* and *situation* of the *party* making the annexation, and the purpose or use for which the annexation has been made. This criterion furnishes a test of general and uniform application; one by which the essential qualities of a fixture can, in most instances, be certainly and easily ascertained, and tends to harmonize the apparent conflict in

chines, though most of them are fastened to the floor by nails or screws, or held in position by cleats, are personal property. They are annexed merely to keep them in position; some of them could not be operated unless held firmly in place. Though, in putting down a new floor, it was laid down around the feet and standards of the machines, it was not laid over but only up to them." The machinery used in a canning business is considered a fixture, and will pass by deed or mortgage: *Dudley v. Hurst*, 67 Md. 44; 1 Am. St. Rep. 368.

the authorities relating to the subject. It may be found inconsistent with the reasoning and distinctions in many of the cases; but it is believed to be at variance with the conclusion in but few of the well-considered adjudications."¹ The presumption in case of doubt is, that as the interest of the vendor of real estate is permanent, all annexations that he has made are for his prolonged enjoyment, and for the substantial and continued enhancement in value of the property.²

§ 1212. **Value added to realty.**—The course adopted by the majority of the decisions is to consider everything which has been attached to the realty for the purpose of adding to its value, a fixture passing with a conveyance of the land.³ "Great diversity exists in the adjudications on this subject, and few decisions can be considered as absolute authorities in other instances, even of fixtures of a similar denomination. It will be found, on an examination of the books, that considerations of custom, intention, ornament, convenience, and so forth, have all had influence in controlling the cases. Whilst it has been held that chattels should not be regarded as fixtures, unless they are so far incorporated with the structure of which they form a part that they cannot be severed from it without injuring the structure itself, as in *Farrar v. Chauffetete*,⁴ yet the general course of decision is in favor of viewing everything as a fixture which has been attached to the realty, with a view to the purpose for which it is employed or held, however slight or temporary the connection between them. In accordance with this rule, it has been held repeatedly that the machinery of a manufactory is to be regarded as a part of the realty, whether it is attached to the body of the building, or merely con-

¹ In *Teaff v. Hewitt*, 1 Ohio St. 511, 530; 59 Am. Dec. 634.

² *Tift v. Horton*, 53 N. Y. 377, 382; 13 Am. Rep. 537; *Potter v. Cromwell*, 40 N. Y. 287; 100 Am. Dec. 485.

³ *Johnson v. Wiseman*, 4 Met. (Ky.) 357; 83 Am. Dec. 475; *Crane v. Brigham*, 11 N. J. Eq. 29; *Philipson v. Mullanphy*, 1 Mo. 620.

⁴ 5 Denio, 527.

nected with the other machinery by running bands or gearing which may be thrown off at pleasure, and without injury to the freehold. In general, it may be said that, as between vendor and vendee, the purchaser is clearly entitled to everything that has been annexed to the freehold with a view of increasing its value, or adapting it to the purposes for which it is used; and within this principle it has been held that pipes and bathtubs of a dwelling, the counters of a store, the vats, stills, and kettles of a brewery or distillery, are fixtures."¹

¹ *Rogers v. Crow*, 40 Mo. 91, 95; 93 Am. Dec. 299, per Wagner, J., citing *Walmsley v. Milne*, 7 Com. B., N. S., 115; *Wilde v. Waters*, 16 Com. B. 637; *Cohen v. Kyler*, 27 Mo. 122; *Tabor v. Robinson*, 36 Barb. 485; *Man v. Schwarzwald*, 4 Smith, E. D. 273; *Bryan v. Lawrence*, 5 Jones, 337. In *Johnson v. Wiseman*, 4 Met. (Ky.) 357, 83 Am. Dec. 475, Peters, J., delivering the opinion of the court, says (p. 360): "There can be no doubt that upon the sale of the freehold, fixtures will pass in the absence of any express provision to the contrary. It has been held in some cases that to give chattels the character of fixtures, and deprive them of that of personalty, they must be so firmly fixed to the realty that they cannot be removed without injury to the freehold from the act of removal, and apart from the subtraction of the thing removed; but the better opinion is, however, the other way, and in favor of viewing everything as a fixture which has been attached to the realty, with a view to the purposes for which it is held or employed, however slight or temporary the connection between them. It has accordingly been decided in a great number of cases, that the machinery of a manufactory is to be regarded as a part of the realty, whether it be attached to body of the building, or merely connected with the other machinery by running bands or gearing which may be thrown off at pleasure, and without injury to the freehold: *Notes to Elwes v. Mawe*, and authorities cited: 2 Smith's Lead. Cas. 249. Nor can it be said that actual annexation was so essentially necessary to constitute a fixture, even in the earliest and most technical periods of the common law, as to bear down and overpower all other considerations. The doctrine of heirlooms necessarily implies that chattels may be deprived of their movable and personal character, and rendered inseparably attendant upon the inheritance, by the force of moral association. It has never been doubted that the keys of a house, or the fences or walls of a farm, are part of the freehold. It was held in *Kittredge v. Woods*, 3 N. H. 503, 14 Am. Dec. 393, and *Parsons v. Camp*, 11 Conn. 525, that the manure on a farm at the time it was sold vested in the vendee. And these decisions were followed in *Goodrich v. Jones*, 2 Hill, 142, and the purchaser held to be both entitled to the manure and the fences, although the latter had been detached from the soil: *Goodrich v. Jones*, 2 Hill, 142. These authorities are cited to show that the ancient rule which treated nothing as fix-

§ 1213. **English view of movable machinery.**—In England and Ireland, the courts manifest a strong inclination to consider all machinery annexed to the floor, ceilings, or sides of a building in a "*quasi* permanent manner," by bolts or screws, as being fixtures which pass by a deed or mortgage to the purchaser or mortgagee. They hold that the facts, that the design of the annexation was solely to steady the machines when in use, that their removal might be effected without injury to them or to the freehold, and that the machines are in the nature of trade fixtures, which as between landlord and tenant, belong to the latter, can make no difference; they are nevertheless regarded as a part of the realty.¹ In a case determining what articles passed as fixtures, where the owner of certain premises created a mortgage upon them, and afterward executed a bill of sale of the machinery therein contained to a third person, and subsequently executed a deed to the mortgagee of the land covered by the mortgage, the assignee under the bill of sale having notice of the prior mortgage, this question arose. The authorities are reviewed by Hannen, J., who says: "On the part of the plaintiff, it was strongly contended on the authority of *Hellawell v. Eastwood*,² that the machines and articles now in dispute, looking to the nature of the articles, the mode of annexation, and the object and purpose of annexation, were not in truth fixtures at all, but remained mere movable goods and chattels, which would be liable to distress, as the machines

tures except such chattels as were fastened to the realty, and were more or less immovable, has been modified and molded to suit the improvements in art and science of modern times." See *Fairis v. Walker*, 1 Bail. 540; *Voorhis v. Freeman*, 2 Watts & S. 117; 37 Am. Dec. 490; *Heermance v. Vernoy*, 6 Johns. 5; *Gary v. Burguires*, 12 La. Ann. 227; *Pierce v. George*, 108 Mass. 78; 11 Am. Rep. 310; *Allen v. Woodard*, 125 Mass. 400; 28 Am. Rep. 250; *Parsons v. Copeland*, 38 Me. 537.

¹ *Longbottom v. Berry*, Law R. 5 Q. B. 123, 137; s. c. 39 Law J. Q. B. 37; 10 Best & S., 852, 877; 22 L. T., N. S., 385; *Mather v. Fraser*, 2 Kay & J. 536; 25 Law J. Ch. 361; *Walmsley v. Milne*, 7 Com. B., N. S., 115; 29 Law J. Com. P. 97; *Cullwick v. Swindell*, Law R. 3 Eq. 249; *Olimie v. Wood*, Law R. 3 Ex. 257; s. c. in error, Law R. 4 Ex. 328.

² 6 Ex. 295; 20 Law J. Ex. 154.

called cotton mules were held to be in that case. The grounds of decision given by the court in that case being, that the annexation there was so slight as to admit of removal of the machines without injury to the building or themselves, and the object and purpose of annexation being not to improve the inheritance, but to render the machines steady and more capable of convenient use as chattels. In that case, the mules were affixed in the same manner as many of the machines in the present case. But it is observable that the case was decided before any of the cases to which we have referred, and was cited in all, or most of them, but not followed in any. On the contrary, it was distinguished in *Mather v. Fraser*,¹ by the present lord chancellor, then vice-chancellor, who observed that it was a case between landlord and tenant, and was altogether inapplicable to the question whether machines fixed by an owner of the soil passed to a mortgagee of the freehold. In that case, machinery fixed in the same manner as the machines in *Hellawell v. Eastwood*,² were considered to pass to a mortgagee as fixtures; and so also in *Walmsley v. Milne*,³ the fact that the machinery was so fastened as to admit of severance without injury to the building, or the things fixed, was also disregarded by the court; as was also, in *Climie v. Wood*,⁴ the special additional facts found by the jury, that the object of annexation was for the more convenient use of the things fixed, and not to improve the inheritance. In the present case the machinery in question was nearly all firmly fixed to the building, in what the vice-chancellor, in *Mather v. Fraser*,⁵ calls a *quasi* permanent manner, viz., by screws, or bolts, or soldered with lead; in most cases they were affixed to the floor, in some both to floor and roof, and in others, to the side walls. This fixing was clearly necessary, for they could not otherwise be effect-

¹ 2 Kay & J. 536.

² 6 Ex. 295; 20 Law J. Ex. 154.

³ 7 Com. B., N. S., 115; 29 Law J. Com. P. 97.

⁴ Law R. 3 Ex. 257; in error, Law R. 4 Ex. 328.

⁵ 2 Kay & J. 536.

ally used, as, for the same reason, the fixing was obviously not occasional, but permanent. It is no doubt said in this case that the object of fixing was to insure steadiness and keep the machines in their places when worked; but the same thing could probably be said of most trade fixtures, from a steam-engine downward, and if the effect of this fixing is to cause the whole set of machines to be effectually used in the manufacture of wool and cloth, it seems very difficult to avoid coming to the conclusion that a necessary consequence is to cause the mill to be put to a more profitable use as a wool mill than it otherwise would be; it is also equally difficult to conceive that a machine, which, at all times, requires to be firmly fixed to the freehold, for the purpose of being worked, could truly be said never to lose its character as a movable chattel. We therefore think that the case of *Hellawell v. Eastwood* was well distinguished from cases like the present in *Mather v. Fraser*; and that all the fixed articles in this case were such articles, in the nature of trade fixtures, as were considered by the court of error in *Climie v. Wood*, to pass to the mortgagees, and that they passed here to the defendants, under their mortgage and subsequent conveyance.”¹ In a case in Ireland, looms made fast to a tiled floor, by wrought-iron spikes driven through the tiles, are fixtures that will pass by a conveyance.”²

¹ In *Longbottom v. Berry*, Law R. 5 Q. B. 123, 137; s. c. 39 Law J. Q. B. 37.

² In *re Dawson, Tate & Co.*, Irish R. 2 Eq. 218. See, also, *Barnett v. Lucas*, 5 I. R. C. L. 140; *Boyd v. Shorrocks*, Law R. 5 Eq. 72; s. c. 37 Law J. Ch. 144; 17 L. T., N. S., 197; 16 Week. R. 102; *Holland v. Hodgson*, Law R. 7 Com. P. 328; *Wiltshire v. Cottrell*, 1 El. & B. 674; s. c. 22 Law J. Q. B. 177; 17 Jur. 758; 18 Eng. L. & Eq. 142; *The Patent Peat Co.*, 17 L. T., N. S., 69; *Parsons v. Hind*, 13 Week. R. 860. The court said, per Miller, J., in *In re Dawson, Tate & Co.*, Irish R. 2 Eq. 218 (p. 221): “Another, however, and a serious question, arises from the deed of 1866, not having been registered as a bill of sale, namely, whether the looms which had been erected in the factory at Banview, and mentioned in the schedule to that deed, were fixtures so as to pass by the mortgage of June, 1866, or movable chattels vested in the assignees. There has been evidence, both on the part of the assignees and mortgagees, as regards that question. . . . The evidence relied upon by the mortgagees

§ 1214. **American cases.**—In this country, it seems to be generally considered, though there are many cases to the contrary, that if the articles can be removed without essential injury to the freehold or to themselves, and if the purpose of attaching them to a structure is solely to maintain them in a steady condition, they are personal property, and a deed or mortgage will not transfer them, unless such is the express intention to be gathered from the deed itself. Thus, machinery in a blacksmith and wagonmaker's shop, consisting of a boring lathe, an engine lathe, a wood-turning lathe, a press drill, a press punch, an upright saw, and a circular saw, all propelled by water and attached to the building for the purpose of making

of 1866, as establishing that the looms in question were fixtures, was that given by Watts, a practical engineer, who was sent down specially to the Banview factory for the purpose of making an examination of these looms. He stated that the floors upon which the looms were placed were paved over with tiles or bricks about a foot square; that three of the looms were not attached to the floor; that one hundred and one looms were attached by a wrought-iron spike driven through the feet of each loom into the floor. The spike is five inches long by a half inch thick, and he had to get a hammer and chisel to draw it out. The spikes were driven into the floor and the looms were fastened down to prevent them from moving; and he stated that the fastening was essential to their being worked. The evidence relied upon by the assignees was that of Mr. Woodford, who stated that although he was not an engineer, he was familiar with such subjects, and was a flax sewing-machine maker. He said there was a fastening on the looms, by a spike put down into the tiles, and that the tiles were about two inches thick; that if the belts by which the machines were moved were tight, they were liable to be lifted up, if not made fast to the floor (but that would be only at the time the machine might be set going), and that if not fastened down some accident might take place; nearly all the looms were fastened, and only three or four were loose; he does not say there was any use in a fastening, further than to prevent an accident in case of a tight belt. Upon the whole of the evidence in this case, and upon the question of the fixtures, I cannot come to any other conclusion than that the one hundred and one looms at the factory in Banview, which were fastened in the manner and for the purposes described, had the elements necessary to constitute a fixture, and were, at the date of the bankruptcy in this matter, fixtures attached to the freehold; but that the remaining three looms that were not so fastened, and as to which there is no very clear evidence as to whether in fact they ever had been used, could not be regarded as having been fixtures at the date of the bankruptcy."

them firm, and which can be removed from the building without serious injury to it, are personal property, and not fixtures.¹ So, where property embracing various articles of machinery for carding, spinning, twisting, balling, preparing, and packing cotton, and standing upon the floor of the mill over the apertures therein, made for the passage of the leather bands or belts by which the machinery was moved; and where the machinery was not fastened to the building in any other manner than by such bands and belts, and in some cases by cleats tacked to the floor, the bands being used for motion, and not for fastening, and where each machine might be removed without injury to itself or to the building, it was held in a controversy between a person claiming the machinery under a mortgage upon the realty and creditors of the mortgagor under an execution against his property, and under a chattel mortgage, that the articles were not attached to the building in such a manner as to constitute them fixtures.² "To constitute an instrument or ma-

¹ *Bartlett v. Wood*, 32 Vt. 372.

² *Vanderpoël v. Van Allen*, 10 Barb. 157. See, also, *Swift v. Thompson*, 9 Conn. 63; 21 Am. Dec. 718; *Murdock v. Gifford*, 18 N. Y. 28; *Tobias v. Francis*, 3 Vt. 425; 23 Am. Dec. 217; *Cresson v. Stout*, 17 Johns. 116; 8 Am. Dec. 373; *Capen v. Peckham*, 35 Conn. 88; *Gale v. Ward*, 14 Mass. 352; 7 Am. Dec. 223; *Gaylor v. Harding*, 37 Conn. 508; *Graves v. Pierce*, 53 Mo. 429; *McKim v. Mason*, 3 Md. Ch. 186; *Sturgis v. Warren*, 11 Vt. 433; *Penn Mut. Ins. Co. v. Semple*, 38 N. J. Eq. 575; *Southbridge Sav. Bank v. Exeter Machine Works*, 127 Mass. 542; *Maguire v. Park*, 140 Mass. 21; *Rogers v. Brokaw*, 25 N. J. Eq. 496; *Wolford v. Baxter*, 33 Minn. 12; 53 Am. Rep. 1; *McConnell v. Blood*, 123 Mass. 47; 25 Am. Rep. 12; *Robertson v. Corsett*, 39 Mich. 777; *Carpenter v. Walker*, 140 Mass. 416; *Hubbell v. East Cambridge Sav. Bank*, 132 Mass. 447; 43 Am. Rep. 446; *Scheifele v. Schmitz*, 42 N. J. Eq. 700. In *Vanderpoel v. Van Allen*, 10 Barb. 157, *Brown, J.*, said: "The property in dispute consists of various articles of machinery for carding, spinning, twisting, balling, preparing, and packing cotton yarn and cotton twine. It stands upon the floor of the mill, over the apertures or openings therein, made for the passage of the leather bands or belts by which it is moved, and is not fastened to the building otherwise than by such belts and bands, and in some few instances and articles by cleats tacked to the floor because it was out of level when placed upon it. The bands are used for motion, and not for fastening, and the cleats to give a uniform and level surface to the floor of the building. The motive power is

chine employed in the business of trade or manufactures, a fixture, so as to pass with the deed as parcel of the freehold, it must be permanently habitually attached to it,

water; the belts or bands passing over a wheel or pulley upon each separate machine, and from thence run over drums upon lines of shafting, geared in communication with the waterwheel. The belts or bands are slipped off and on the pulleys by hand, so as to put it in operation, or arrest its motion, at the pleasure of the operator. Every machine may be easily and conveniently removed without injury to itself or to the building in which it stands; and if so removed might be used with the same effect and for the same purpose on the floor of any other building where there is motive power to put it in operation. The mill or building would suffer no detriment from such removal, for it is immediately, and without any previous preparation, adapted to the use of similar machines for the manufacture of the same article, or for any other machines employed in a different manufacture, which stand upon a level floor, and are put in motion by a pulley and a band. The machinery was not constructed in the building or upon the premises where it is used, for the better enjoyment of the inheritance; but each separate article was made in a work or machine shop in a different place, and removed entire and complete and fit for use to the place where it now is. It is in proof that such like machinery is oftentimes the property of the manufacturer, while the mill where it is used is the property of another; and that it is a common occurrence to remove the articles separately from the mill to the workshop, to be repaired and remodeled, and when so repaired they are returned to the mill again. There is nothing in the pleadings or proofs to show when the property was placed in the mill—whether before or since the date of the plaintiff's mortgage—so that if it has now become a part of the freehold, it is subject to the plaintiff's lien, and cannot be removed. Otherwise it belongs to the defendants, and may be taken away and appropriated by them to the payment of their debt. Fixtures are defined to be 'chattels or articles of a personal nature which have been affixed to the land.' To make an article a fixture, 'it must not only be essential to the business of the erection, but it must be attached to it in some way; at least it must be mechanically fitted, so as, in ordinary understanding, to make a part of the building itself.' The general rule is 'that anything of a personal nature not fixed to the freehold cannot be considered as an incident to the land, as between vendor and vendee.' The property in question is not actually annexed to the freehold. The mere setting down upon the floor of the building, and the leather bands slipped on to the pulleys when it is in motion, do not effect a physical union. Nor do the circumstances, in my judgment, make out a constructive annexation. Each of these machines is complete and perfect, and, to a great extent, independent in itself. If any one of them is dependent on another, they are not all dependent on each other, nor on the water power and the mill, except for motion, for the proof shows that there is no particular fitness or adaptation to this mill or water power more than

or it must be a component part of some erection, structure, or machine which is attached to the freehold, and without which the erection, structure, or machine, would be imperfect and incomplete.”¹

there is to any other. This machinery bears but little resemblance, if any, to the key of a door, the chain, dogs, and bars of a sawmill, the stone of a gristmill taken up to be picked, the venetian blind, window-shutters and doors temporarily removed from their hinges, or the mill irons and gearing dislocated and carried away by a flood, of which we read in the books; for they were essential and necessary parts of machinery or structures, which were so firmly united with the freehold as to make them fixtures beyond all dispute. The rigor of the ancient law of fixtures, as between landlord and tenant, has been much relaxed in modern times for the benefit of trade. In this State it has been modified as between heir and executor or administrator (2 Rev. Stats. 24, § 6); but between vendor and vendee, mortgagor and mortgagee, it remains as it always was. The uncertainty which we constantly encounter in the investigation of the subject sometimes arises from the nature of the thing claimed to be a fixture; and at other times, from the means by which it is supposed to be united with the freehold. Connection, or disconnection, union or separation, seemed to be the essence of the ancient rule; yet, to insist upon it in its literal sense, will not free the subject from its real difficulties. There are certain things upon agricultural land—of which rail fences may be given as an example—resting upon its surface, and in no other way attached to it, light, movable, and actually moved about from place to place, and from time to time, to suit the convenience of the occupant, which the law and the universal sense of mankind regard as fixtures; while there are certain other things attached to the interior walls of a dwelling-house, by nails, screws, and iron straps, of which mirrors and paintings may be given as examples, which are in like manner regarded as chattels. In respect to structures and machines used in the business of trade and manufacturing, there is a wide and manifest distinction between ponderous articles purposely fitted and adapted to the places where they are used, and unfitted and unadapted to all others, of which waterwheels, mill gearing, shafts, carriageways for sawmills, steam boilers, and engines may be given as examples, and those lighter, more portable, and wonderful creations of human ingenuity and skill, of which power looms, carding, spinning, and pin machines may be cited as examples, which stand like a piece of furniture upon a floor, are moved by any kind of motive power; which may be displaced, and repaired and replaced, without interruption to the business or hindrance to the other machinery, and which have no other connection with the freehold but that formed by the leather band which puts them in motion.”

¹ *Vanderpool v. Van Allen*, 10 Barb. 157. And see *Hellawell v. Eastwood*, 6 Ex. 295; *Parsons v. Hind*, 14 Week. R. 860; *Hutchinson v. Kay*, 23 Beav. 413; *Waterfall v. Penistone*, 6 El. & B. 876; *Rogers v. Brokaw*, 25 N. J. Eq. 496.

§ 1215. **Different view.**—A different view, however, prevails in some of the States. Thus, in North Carolina, a cotton-gin and press attached to the freehold in the usual way have been held to be fixtures.¹ In Mississippi, gin-stands annexed to the freehold in the ordinary manner are regarded as fixtures which pass by a sale of the realty.² In Maine, it was held that belts, looms, carding machines, pickers, jacks, spoolers, and dressers, suited and designed for a woolen factory, and placed therein by the owners, although they were capable of removal without injury to the freehold, were fixtures, appertaining to the realty, and, accordingly, such articles, in a partition ordered among tenants in common, may be divided as real estate.³ A planing machine, lathes, and vises in a machine shop or car factory, if they are a necessary part of the machinery for carrying on the business, it was decided in Pennsylvania, are fixtures, appurtenant to the realty, without regard to the manner in which they are attached to the building in which they are used.⁴ Acting on the principle that machinery in a cotton or woolen factory, necessary to constitute it, is a part of the freehold, and as such will pass by the owner's deed, or by the deed of the sheriff selling the real estate upon execution, the court in the same State determined that where such a fixture was detached by the former owner, after a sale by the sheriff, the purchaser of the real estate could maintain replevin for the article against the person who detached it.⁵

¹ *Bond v. Coke*, 71 N. C. 97.

² *Richardson v. Borden*, 42 Miss. 71; 2 Am. Rep. 595.

³ *Parsons v. Copeland*, 38 Me. 537.

⁴ *Christian v. Dripps*, 28 Pa. St. 271. It was also held in this case that the proof of a custom in opposition to the law of fixtures could not evade the rule.

⁵ *Harlan v. Harlan*, 15 Pa. St. 507; 53 Am. Dec. 612; s. c. 20 Pa. St. 303. See, also, *Symonds v. Harris*, 51 Me. 14; 81 Am. Dec. 553; *Deal v. Palmer*, 72 N. C. 582; *Latham v. Blakely*, 70 N. C. 368; *Tate v. Blackburne*, 48 Miss. 1; *Trull v. Fuller*, 28 Me. 545; *Bratton v. Clawson*, 2 Strob. 478; *Baker v. Davis*, 19 N. H. 325; *Fairis v. Walker*, 1 Bail. 540; *McDaniel v. Moody*, 3 Stewt. 140. Compare *Hancock v. Jordan*, 7 Ala. 448; 42 Am. Dec. 600; *Cole v. Roach*, 37 Tex. 413.

§ 1216. **Effect of statute.**—A statute in California provided that “any inhabitant of this State, who has put or placed improvements upon any lands belonging to this State, or the United States, or who has the right of possession of such improvements on said lands, shall have the right to remove such improvements from such lands at any time within six months after such lands shall have become the private property, by purchase or otherwise, of any person or persons, firm, corporation, or company, either within or without this State; and such inhabitant shall not be liable to an action for damages for the removal of such improvements within the time above stated. All houses, barns, sheds, outhouses, buildings, and fences, and all orchards and vineyards, shall be deemed and held to be improvements, within the meaning of this act.” This statute, in respect to improvements which were attached to the soil, and became a part of the freehold, was held to interfere with the primary disposal of the public lands by the United States, and to be in conflict with the act of Congress admitting California into the Union.¹ But while this is held of improvements at-

¹ *Collins v. Bartlett*, 44 Cal. 371; Stats. Cal. 1867–68, p. 708. Rhodes, J., delivering the opinion of the court in *Collins v. Bartlett*, said (p. 383): “This enactment raises the question whether this State has authority to provide that a patent issued in accordance with the acts of Congress, upon a sale of the public lands of the United States, shall not convey absolutely to the purchaser all that it purports to convey—all the real estate within the boundaries of the lands described in the patent. If houses, fences, orchards, and vineyards on the lands of the United States are real estate, they are as much a part of the freehold as the soil itself; and the statute, by giving to them other names, does not change their character, or sever them from the land. They being a part of the freehold, a patent issued in the usual form by the United States would convey them to the purchaser of the land, and the State cannot prevent them from vesting absolutely in the purchaser by virtue of the patent, without interfering with the primary disposal of the public lands by the United States. When the ‘improvements’ are in fact personal property, it needs not the aid of a statute to give the owner the right to remove them from the land, and it is equally clear that the statute, so far as it purports to give the claimant the right to remove them from lands of which they formed a part when they were sold and conveyed by the United States, is void, because in conflict with the act admitting this State into the Union.”

tached to the realty, so as to become a part of it, it is also held that, if buildings and fences erected on the public lands of the United States are not attached to the soil in such a manner as to form a part of the freehold, they do not pass to a purchaser from the United States, the latter having no interest in them; the person who constructs them is entitled to remove them after the issuance of a patent to the purchaser.¹ Statutes commonly designated as "betterment laws," which provide for the payment by the true owner for improvements made by another, intended to secure to the latter the fruits of his labor, have been held to be constitutional almost without question.²

§ 1217. Right to remove under contract for purchase.—Where a party is in possession of real estate under a bond for a deed, there being no agreement for the payment of rent, and fixtures are added by him to the realty, his right to remove them is determined by the rule which obtains between vendor and purchaser, and not

¹ *Pennybecker v. McDougal*, 48 Cal. 160.

² Among the many cases so holding we select the following: *Ross v. Irving*, 14 Ill. 171; *Brown v. Storm*, 4 Vt. 37; *Childs v. Shower*, 18 Iowa, 261; *Longworth v. Worthington*, 6 Ohio, 10; *Whitney v. Richardson*, 31 Vt. 300; *Pacquette v. Pickness*, 19 Wis. 219; *Fowler v. Halbert*, 4 Bibb, 54; *Hunt's Lessee v. McMahan*, 5 Ohio, 133; *Withington v. Corey*, 2 N. H. 115; *Scott v. Mather*, 14 Tex. 235; *Saunders v. Wilson*, 19 Tex. 194; *Bacon v. Callender*, 6 Mass. 303; *Moss v. Shear*, 25 Cal. 44; 85 Am. Dec. 94; *Love v. Shartzer*, 31 Cal. 487. See also, *Fenwick v. Gill*, 38 Mo. 510; *Marlow v. Adams*, 24 Ark. 109; *Griswold v. Bragg*, 48 Conn. 577; *Coney v. Owen*, 6 Watts, 435; *Dothage v. Stuart*, 35 Mo. 251; *Jones v. Carter*, 12 Mass. 314; *Howard v. Zeyer*, 18 La. Ann. 407; *Steele v. Spruance*, 22 Pa. St. 256; *Pope v. Macon*, 23 Ark. 644; *Kidd v. Guild*, 12 N. W. Rep. (Mich.) 158; *Ormond v. Martin*, 37 Ala. 598; *Lynch v. Brudie*, 63 Pa. St. 206. *Contra*, *Nelson v. Allen*, 1 Yerg. 376. And see *Harris v. Inhabitants of Marblehead*, 10 Gray, 44; *Davis' Lessee v. Powell*, 13 Ohio, 308; *Society etc. v. Wheeler*, 2 Gall. 105; *McCoy v. Grandy*, 3 Ohio St. 463. A carpenter shop erected after the execution of a mortgage upon premises, for trade purposes, and built of rough materials, placed upon blocks resting on boards put upon the surface of the ground, but not let into the ground, was held not to pass to a purchaser at a sale of the real estate under the mortgage: *Kelly v. Austin*, 46 Ill. 156; 92 Am. Dec. 243. See *Rogers v. Brokaw*, 25 N. J. Eq. 496; *Crane v. Brigham*, 11 N. J. Eq. 29; *Randolph v. Gwynne*, 7 N. J. Eq. 88; 51 Am. Dec. 265; *Holland v. Hodson*, Law R. 7 Com. P. 328.

that which prevails between landlord and tenant. This is but following out the strict rule of the common law, and in accordance with the principle that when a stranger erects a building upon the land of another without the latter's consent, it becomes a part of the land, and he would occupy the position of a trespasser by removing it.¹ As was said in one case where this question arose: "If the intention of Whitelock was to render the improvement permanent when erected, there can be no question that it became a part of the freehold, and no subsequent change of intention changed its character to that of personal property, rendering it liable to levy and sale on an execution from a justice of the peace. The intention at the time to render it a part of the realty, fixed its character beyond all dispute, and that character could not be changed by anything short of its severance by removal, or by an executed agreement for that purpose. The mere change of the intention of the owner cannot have that effect."²

§ 1218. **Application of rule.**—Applying the principle that the proper rule in cases of this kind is the one prevailing between vendor and vendee, the Supreme Court of Massachusetts decided that a trip-hammer firmly attached to a block set in the ground, the blower of a forge, a force-pump and its pipes for raising water on the premises, and shafting fastened to the building by screws and bolts, are part of the realty, and cannot be removed after breach of the bond; but a portable steam-engine and boiler capable of being removed, without removing brickwork, vises fastened to a workbench by screws and bolts merely, a planing machine and anvils not fastened to the buildings, a grindstone on a movable frame, and an emery machine fastened to the floor with bolts, both of the latter being capable of removal without injury to the building, are personalty, and may be removed after a breach of the bond.³

¹ Tyler v. Fickett, 75 Me. 211.

² Dooley v. Crist, 25 Ill. 551, 556, per Walker, J.

³ McLaughlin v. Nash, 14 Allen, 136; 92 Am. Dec. 741. A person

§ 1219. **Reason for rule.**—The rule and the reason for it has thus been succinctly stated: "Although, in a certain sense, a person occupying land under a contract of purchase may be said to be a tenant of the owner, still the analogy does not hold good in all respects. In one essential particular it fails. The occupier is not liable to pay rent to the owner. It would seem to follow that he has no right to remove fixtures annexed by him to the freehold. The reason why a tenant is allowed to remove structures erected for purposes of trade or convenience, affixed by him to the realty during his tenancy, is because having paid as rent a full equivalent for the use of the premises as demised it would be inequitable to compel him to forfeit articles at the end of his term, which he had procured for his own use and at his own expense. That reason is wholly inapplicable to a case like the present. The occupant has paid no equivalent for the use and enjoyment of the premises; nor is he compelled to surrender the estate at a fixed period of time, as upon the expiration of a term demised. He can, by fulfilling his contract of purchase, become the owner of the estate, and enjoy the full benefit of all the erections and improvements which he has made thereon. There is, therefore, no reason for applying to a case of this sort the very liberal rule in regard to fixtures which prevails where the relation of lessor and lessee subsists between the parties."¹ In that case, the person occupying the land, under an agreement with the owner to purchase it, was held not entitled to remove a wooden building with stone foundations placed upon the land, the building being used for a stable and shoemaker's shop.

§ 1220. **Some illustrations.**—An agreement was made between two persons, by which the first, the owner of a parcel of land, agreed to sell it to the second, and to con-

erecting a barn upon the real estate of another, under similar circumstances, has been held to have no right to remove it: *Hemmenway v. Cutler*, 51 Me. 407.

¹ Bigelow, J., in *King v. Johnson*, 7 Gray, 239, 241.

vey it to him by deed when the latter should erect a house thereon; the second party agreed to erect a house on the land, and on receiving a deed to mortgage the property to the first to secure the purchase money. It was held that the person occupying the land under this agreement, did not, by erecting the house, acquire any property therein, but it became a part of the realty, and hence a mortgage of the house by him to a third person before he obtained a deed for the land, conveyed nothing to the mortgagee.¹ A purchaser of a lot in a city, holding it under a contract of purchase which contained clauses of forfeiture, erected a house upon the land by placing it upon blocks lying upon the ground; having failed to make the payments called for by the contract, he sold the house to a person who removed it from the lot; the seller of the lot replevied the house, and it was held that the purchaser so long as he occupied the premises under his contract, had no right to erect a building thereon with intent to remove it, that such intent would be in fraud of the rights of the vendor, and that the purchaser of the building occupied no better position, and upon a severance the owner

¹ *Milton v. Colby*, 5 Met. 78. Says Shaw, C. J., delivering the opinion of the court (p. 81): "It appears to us that the effect of this agreement was not that the builders of the house were to have a property in the house as a chattel; on the contrary, it was to constitute a part of the realty, and pass with it; and when the agreement should be executed according to its terms, it would enhance the value of the estate as a security to Nesmith for the purchase money. The general rule is, that the erection of a building on the land of another makes it a part of the realty, and of course it becomes the property of the owner of the soil; and it is only in virtue of an express agreement between the owner and builder, that one can have a separate property on a building as a chattel, with a right to remove it. The agreement between these parties, so far from being such an agreement, was, in legal effect, an agreement that the building and soil should be united and held together as one tenement, and the security of the builders was in the personal agreement of the owner, by which they could require him, on complying with the terms of the agreement on their part, to convey the fee to them, by which they would obtain a legal title to the buildings with the soil. No interest then passed by Diggles' deed to the plaintiffs; none in the building, for it was part of the realty; and none in the real estate, because the fee was in Nesmith."

had the right of possession, and might maintain replevin for its recovery as long as it could be identified and was not permanently attached to other land.¹ For further illustration, we may call attention to a case in Massachusetts where a bond was given by an owner of land to convey the same to a purchaser on the payment of a specified sum. The vendee erected a house on the land, but there was no agreement on the part of the vendor that it might be removed. The vendee paid part of the price agreed upon, and assigned to his son for an inadequate consideration the bond for conveyance, in order to prevent the land from being levied upon by his creditors. Some of the creditors of the vendee had, however, in the meantime, attached the house and caused it to be sold as personal property, and possessing full knowledge of the facts, they took a conveyance of the land from the vendor. It was held that before the assignment of the bond to the vendee's son, the vendee did not possess such an interest in the land as could be attached or levied upon by his creditors; that the house built by him on the land could not be considered as personal property, but must be treated as real estate; and that his son, if he tendered to the vendor the balance due by the terms of the agreement, and demanded a conveyance in accordance with the provisions of the bond, might, in case of the vendor's refusal, maintain a bill in equity against him for a specific performance.² It is proper in this connection to

¹ *Ogden v. Stock*, 34 Ill. 522; 85 Am. Dec. 332; *Davis v. Easley*, 13 Ill. 192; *Eastman v. Foster*, 8 Met. 19; *Poor v. Oakman*, 104 Mass. 309; *English v. Foote*, 16 Miss. 444; *Perkins v. Swank*, 43 Miss. 349; *Oakman v. Dorchester Ins. Co.*, 98 Mass. 57; *Christian v. Dripps*, 28 Pa. St. 271.

² *Murphy v. Marland*, 8 Cush. 575. *Shaw, C. J.*, delivering the opinion of the court, referring to the defense made by the defendant, that he had a right to hold it from C, the assignee, for the benefit of the creditors of B, or some of them, and that he had in fact conveyed it to some of them, said: "The defense assumes that the assignment of this chose in action from Peter Murphy to his son, the design both of assignor and assignee being indirectly to defeat creditors, was fraudulent and void; and as every plaintiff must prevail on the strength of his own title, if that of the plaintiff is void, he cannot have this remedy, whether

note a case where a party in possession of land under a contract of purchase, providing that if he failed to comply with its terms, all tools and machinery placed upon the land by him should be the property of the vendor. A third party leased an engine and boiler to the vendee, giving him also a privilege of purchase, knowing that the machinery was to be affixed to the land, but not knowing of the provisions of the contract between the vendor and

the defendant is justifiable in his course or not. But the construction which has uniformly been put on the statutes, declaring such conveyances fraudulent and void, is that they are voidable only, that they are not fraudulent *per se*, but only as against creditors, that they are good as between the parties, and can only be avoided by a creditor, or by an assignee or other party acting in behalf of a creditor. This principle is too clear to require many authorities; we cite only one of the most recent: *Oriental Bank v. Haskins*, 3 Met. 332; 37 Am. Dec. 140. In the case of *Ensign v. Kellogg*, 4 Pick. 1, already cited, it is held that the obligor in such a bond could not object, that the assignment by the obligee to the assignee was voluntary and without consideration; although being so it would be void as against creditors, if creditors could avail themselves of it. Then the question occurs whether the defense can be sustained in behalf of creditors. Ordinarily, where a conveyance is alleged to be fraudulent and void as against creditors attaching or taking property on execution, proving the fraudulent intent by the parties to defeat creditors, will enable the creditor to recover. But the reason is because the fraud is usually charged upon some conveyance or alienation of real or personal property, in which the debtor had an interest capable in some form of being taken, levied upon, sold, or otherwise directly reached by process of law for the payment and satisfaction of the creditors' claims. But when the thing transferred is such that by no process of law, trustee attachment or otherwise, it could be reached by a creditor, the conveyance is not made void by the statute, and no creditor can interfere or authorize the avoidance of it. In the present case, the chose in action which was the subject of conveyance from Murphy, senior, to his son, had no such conveyance been made, could not have been reached by process of law. The equitable interest in the land stipulated to be conveyed, as the debtor had no legal interest, and no equity of redemption, or such other equitable interest as is made attachable by statute, could not be levied on: *Howe v. Bishop*, 3 Met. 26. The conveyance did not create a debt due from Marland to Peter Murphy, which would render him liable to the trustee process. Nor had Peter Murphy any interest in the building which could be attached as personal property. That right of personal property in a building can only exist when a building is erected on the land of another with his consent, and under an express or an implied agreement that the builder may remove it. It was so held in the case cited by the defendant, in which it was

vendee. These articles were affixed by the vendee to the land in such a manner that their removal could not be effected without destroying the masonry and wall to which they were affixed. The purchase of the land was not completed by the vendee, and he forfeited the lease of the chattels; but the court decided that as against the vendor these articles remained the personal property of the party who leased them to the vendee.¹

also held that independently of contract with the builder, it was a fixture and would pass with the land: *Ashmun v. Williams*, 8 Pick. 402. This is confirmed by a recent case which appears to be directly in point: *Milton v. Colby*, 5 Met. 78. In the present case, there was no agreement or consent of the owner of the soil that the building might in any case be removed; and the builder was to be secured in his rights, not by leave to remove the building, but by the power of acquiring the land on which it stands. It is not for the defendant to decide at his discretion, between the respective claims of the assignee and the creditors of the person with whom he has contracted. He is bound to perform his obligation according to law; and the establishment of the rightful claims of the one, and a performance accordingly, will exempt him from the claims of the other. It is said that giving effect to the plaintiff's claim in this case, will be to give the sanction of the law to a title obtained by a fraudulent and void conveyance. But it is only when a conveyance is made to defeat creditors by a transfer of property, which, but for such conveyance, could have been reached by legal process to satisfy such debts in favor of such creditors, that the law holds the conveyance fraudulent; when it can have no such effect, the law does not hold it fraudulent, but valid. It was suggested on the part of the defendant that if the creditors of Peter Murphy can make no claim to the property through him, they are without remedy. To this it is answered, on the other side, that they might have proceeded against their debtor under the insolvent law, and that the assignee would become vested with all the rights of the debtor, legal as well as equitable, including valuable choses in action, for the benefit of all the creditors. This certainly was plausible, and we do not at present perceive why, if this course had been seasonably adopted, it would not have been effectual; but of this it is not necessary to express an opinion, no such course having been pursued." See, also, *Smith v. Altick*, 24 Ohio St. 369; *Tabor v. Robinson*, 36 Barb. 483; *Watertown Steam Engine Co. v. Davis*, 5 Del. 192; *First Parish in Sudbury v. Jones*, 8 Cush. 184; *Cooper v. Adams*, 6 Cush. 87; *Eastman v. Foster*, 8 Met. 19, 26; *Howard v. Fessenden*, 14 Allen, 124, 128; *Hinckley v. Baxter*, 13 Allen, 139.

¹ *Hendy v. Dinkerhoff*, 57 Cal. 3; 40 Am. Rep. 107, and cases cited. The court said that what the rule would be if the vendor occupied the position of a *bona fide* purchaser, need not be determined, for he did not occupy that position, but having put the vendee in possession, the ven-

§ 1220 a. **Buildings.**—Where a building is erected by one person on the land of another, it is *prima facie* a part of the realty, but if it is erected with the understanding that it may be removed when desired, it is then not a part of the real estate but personal property, and trover will lie for its conversion.¹ A building erected on the land of another without the latter's consent is presumptively a fixture, though the presumption is subject to rebuttal.² But the building may become personal property if the parties so agree.³ And where the owner of the land consents to the erection, the right to remove may be implied.⁴ Where a vendee has entered into possession un-

dor must be held to stand in the shoes of the vendee, and the property in question treated as personalty in his hands as well as in the hands of the vendee.

¹ *Smith v. Benson*, 1 Hill, 176; *Leland v. Garset*, 17 Vt. 403; *Huebschman v. McHenry*, 29 Wis. 655; *Jenkins v. McCurdy*, 48 Wis. 628; 33 Am. Rep. 841; *Lipsky v. Borgman*, 52 Wis. 256; 38 Am. Rep. 735; *Dolliver v. Ela*, 128 Mass. 557; *Taylor v. Collins*, 51 Wis. 123; *Kimball v. Darling*, 32 Wis. 675. On land there was situated a house used as a residence and also as a saloon, and on one side of it, and next to the saloon, was erected a wooden structure, used in connection with the saloon as a dancing hall. The sills of this structure were fastened together at the ends with nails or spikes, and the studs were fastened to the sills in the same manner. The plates were fastened in the same manner, at the top of the studding, the sills and plates being thirty-two feet in length and constructed of two by eight or two by ten timber. In some places the sills rested on the ground, at others on cedar posts set into the ground, and on cedar railroad ties and stones. A floor was laid over the whole space, and on the center was a post eight feet high, from the top of which rafters extended to the plates, the roof being of brush. In the space between the buildings seats twelve feet in length were constructed for the musicians, upon crosspieces fastened to both buildings. The attached building was unfinished, but was intended to be completed, and to be permanently used in connection with the main building for domestic purposes, and as a dancing hall. The building was taken by the sheriff on execution, and in a suit by the owner it was held that the attached building was a part of the realty: *Lipsky v. Borgman*, 52 Wis. 256; 38 Am. Rep. 735.

² *First Parish v. Jones*, 8 Cush. 184; *Bonney v. Foss*, 62 Me. 248; *Howard v. Fessenden*, 14 Allen, 124; *Elwes v. Briggs Gas Co.*, L. R. 33 Ch. D. 567; *Harmon v. Kline*, 52 Ark. 251.

³ *Howard v. Fessenden*, 14 Allen, 124; *Merchants' Nat. Bank v. Stanton*, 55 Minn. 211; 43 Am. St. Rep. 491.

⁴ *Pullen v. Bell*, 40 Me. 314; *Lapham v. Norton*, 71 Me. 83; *Osgood v.*

der a contract, a building of a permanent character erected by him on the land becomes a part of it, and where there is no agreement giving him the right, cannot be removed by him.¹ If a building has been erected by one on the land of another with the right of removal by virtue of an agreement to that effect, it may be mortgaged as personal property.² Where the building is not originally personal property, it cannot become such subsequently by a parol agreement.³ Although a trespasser may believe that he has a valid title to the land, buildings erected by him become a part of the realty.⁴ Where the same person owns both the land and buildings, the latter, of course, are a part of the realty and pass under a deed conveying the land. If the grantor desires to retain

Howard, 6 Me. 452; 20 Am. Dec. 322; *Handforth v. Jackson*, 150 Mass. 149; *Russell v. Richards*, 10 Me. 429; 25 Am. Dec. 254. Said Mellen, C. J., speaking of buildings being personal property when so agreed: "We understand among the profession, this is the principle recognized and acted upon in practice, that such property is considered personal, and is accordingly always sold on execution in the same manner as all other personal estate is sold at auction. Should we decide this cause in opposition to the above-mentioned principles and practice, we should open a door to innumerable frauds, which might be effectually committed with impunity. A person might erect expensive buildings on the land of a friend in whom he could confide, by his express permission, and thus in case of failure in business, perhaps a contemplated or intended failure, he would enjoy a home and ample accommodations at the expense of his defrauded creditors, for if the buildings became the property of the owner of the land, then his creditors could not seize them on execution, and the friend could not be adjudged the trustee of the builder, in consequence of their standing on his land, because the houses are neither goods, effects, nor credits of the builder": *Osgood v. Howard*, 6 Me. 452; 25 Am. Dec. 322.

¹ *Miller v. Waddingham*, 91 Cal. 377. See, also, *Fratt v. Whittier*, 58 Cal. 126; 41 Am. Rep. 251; *Kingsley v. McFarland*, 82 Me. 231; 17 Am. St. Rep. 473; *Westgate v. Wixon*, 128 Mass. 304; *Ogden v. Stock*, 34 Ill. 522; 85 Am. Dec. 332; *Hinkley & Egery Iron Co. v. Black*, 70 Me. 473; 35 Am. Rep. 346; *Allen v. Mitchell*, 13 Tex. 373; *Michigan Mut. L. Ins. Co. v. Cronk*, 93 Mich. 49; *Howard v. Fessenden*, 14 Allen, 124.

² *Lanphere v. Howe*, 3 Neb. 131; *Smith v. Benson*, 1 Hill, 176; *Denham v. Sankey*, 38 Iowa, 269; *Docking v. Frazell*, 34 Kan. 29; *Brown v. Corbin*, 121 Ind. 455; *Goodenow v. Allen*, 68 Me. 308; *Holt County Bank v. Tootle*, 25 Neb. 408; *Deering v. Ladd*, 22 Fed. Rep. 575.

³ *Aldrich v. Husband*, 131 Mass. 480; *Parsons v. Copeland*, 38 Me. 537.

⁴ *Honzik v. Delaglise*, 65 Wis. 494; 56 Am. Rep. 634.

the title to the building, he must do it by some reservation in the deed, or by an agreement that will comply with the statute of frauds. He cannot show by parol that a building was to be reserved.¹ If the owner of land takes the personal property of another and attaches it to the land so that its identity is not lost, and so that it may be removed and used elsewhere, the personal property does not become a part of the real estate, but the owner may recover it in replevin.² But if the owner of the land should build a house on his land with the materials of a stranger, and the nature of the property has become changed, he is compelled to pay only the value of the material.³

§ 1221. **Word "fixtures" in deed.**—The question as to whether certain articles pass by the conveyance may, in some instances, be determined by its language. In one mortgage the property described was "all of the stock of goods and merchandise now in the store." In a subsequent mortgage drawn by the same person, the property described was "all of the stock of goods and merchandise now in the store, and fixtures." The court held that the fixtures were not included in the first mortgage.⁴ Where the term "fixed machinery" was used, a blower pipe, by which air was conveyed from a blower to a forge, both of the latter being permanently fixed in their places, was regarded as included by the term used.⁵ Real estate described by metes and bounds was conveyed for a certain sum, and by a bill of sale executed at the same time certain articles were sold. The vendor took back a mortgage on the real estate which was described in the same manner as in the deed, for security

¹ Leonard v. Clough, 133 N. Y. 292; Muir v. Jones, 23 Or. 332.

² Gill v. De Armant, 90 Mich. 425; Lee Snyder v. Vaux, 2 Rawle, 423; 21 Am. Dec. 466; Silsbury v. McCoon, 3 N. Y. 379; 53 Am. Dec. 307.

³ Peirce v. Goddard, 22 Pick. 559; 33 Am. Dec. 764.

⁴ In re Eldridge, 4 Nat. Bank. Reg. 498; 2 Biss. 362.

⁵ Alvord Carriage Mfg. Co. v. Gleason, 36 Conn. 86.

for the payment of the part of the purchase money remaining unpaid. The vendees afterward executed a chattel mortgage on the property embraced in the bill of sale, and the court held that the real estate mortgage affected only the property conveyed by the deed; inasmuch as the deed and bill of sale were parts of one transaction, each must be considered as intended to perform its appropriate function in the sale.¹ The question is one of interpretation, and the language is to be construed as is the language of other contracts.² An owner of a hotel contracted to sell the same "and the appurtenances and improvements thereunto belonging," the plaintiff reserving, among other things, the right, within a specified time after delivery of possession, to remove from the upper rooms of the hotel his "furniture, carpets, and pictures, but none of the permanent fixtures or appurtenances to said property shall be removed." The vendees having subsequently paid the purchase money, received from the vendor possession and a deed which described the property as it had been described in the contract of sale, and which also contained a recital that it had been made in pursuance of the contract of sale, and subject to the terms, conditions, and reservations contained therein. Both at the time of the execution of the agreement and the subsequent deed, certain gas-fixtures, consisting of chandeliers, globes, brackets, burners, pendants, etc., a kitchen range with boiler attached, a patent water-filter, tanks, and mosquito screens, were attached to the property con-

¹ *Fortman v. Goepper*, 14 Ohio St. 558. And see *Folsom v. Moore*, 19 Me. 252. But see *McRea v. Central Nat. Bank*, 50 How. Pr. 51.

² For particular instances of construction, see *Martin v. Cope*, 28 N. Y. 180; *Hoskin v. Woodward*, 45 Pa. St. 42; *Hancock v. Jordan*, 7 Ala. 448; 42 Am. Dec. 600; *Metropolitan etc. Society v. Brown*, 26 Beav. 454; 5 Jur., N. S., 378; 28 Law J. Ch. 581; *Hare v. Horton*, 5 Barn. & Adol. 715; *Begbie v. Fenwick*, Law R. 8 Ch. 1075; 24 L. T., N. S., 58; *Farrar v. Stackpole*, 6 Me. 154; 19 Am. Dec. 201. And see, also, *Potts v. New Jersey Arms Co.*, 17 N. J. Eq. 404; *Teaff v. Hewitt*, 1 Ohio St. 536; 59 Am. Dec. 634; *Wright v. Chestnut Hill Iron Ore Co.*, 45 Pa. St. 475; *Haley v. Hammersley*, 3 De Gex, F. & J. 587; 30 Law J. Ch. 771; *Quinby v. Manhattan Cloth etc. Co.*, 24 N. J. Eq. 260.

veyed. The vendor, within the time specified in the contract of purchase, demanded the privilege of removing these articles from the hotel. The demand was refused, and he commenced an action for their recovery. The court held that these articles passed by the deed to the grantee as appurtenances.¹ But a deed conveying land, "with all the buildings thereon and certain property connected with or situated in or about the premises," and enumerating specific fixtures and personal property, and conferring the privilege upon the grantor to remove within a specified time "all property not specifically conveyed" by the deed, does not convey trade fixtures which are not specified.²

§ 1222. **Contract of purchase—Payment of rent**—A contract of purchase provided that the purchaser was entitled to remain in possession, and upon the payment of a specified sum with interest was to obtain a deed. If he made a default, he was to be considered a tenant at will. It was decided that while such purchaser might for some purposes be regarded an equitable mortgagor, that, as a general rule, the parties under such a contract occupied toward each other the relation of vendor and vendee, and the latter was not entitled to remove from the premises any annexation to them of a substantial and permanent character. Speaking of the grounds for the existence of this rule, the court observed: "We apprehend the true reason why a purchaser, before the completion of the contract, has no authority to remove improvements which he may have placed upon the land, is not because he is a mortgagor, but because the law presumes they were annexed with the design of being permanent. The exception in favor of trade fixtures is made, because the annexations are supposed to be accessory to the calling of the tenant, and not to the land. That they are made, not with the design of being permanent, but of being

¹ Fratt v. Whittier, 58 Cal. 126; 41 Am. Rep. 251.

² Kirch v. Davies, 55 Wis. 287.

severed at the end of the term. Whilst with the purchaser the presumption is that they are made with the design of their permanent engagement in connection with the land, and as an accessory to it. He makes them in view of their becoming his when he shall have acquired the absolute ownership of the land by conveyance. But until that time he has only the same right to them which he has to the freehold. In any event, the doctrine seems to be too well settled to be now disturbed.”¹

§ 1223. **Question of intent considered.**—The intention with which a chattel is attached to the freehold should always be looked to in determining whether it has become a fixture or not. The intention with which the annexation was made cannot, however, be said to afford anything like a conclusive reason for considering whether the chattel has lost or still retains its character as personalty. It is a circumstance entitled to weight, and that is all. Where there has been no annexation, either actual or constructive, the mere intention to attach personalty is not sufficient to convert it into real estate. Thus, a purchaser at a sheriff's sale of a rolling mill is not entitled, as a part of the realty, to rolls cast for the mill, paid for and delivered at the mill, but which remained there for more than two years without being turned or finished off or put into the mill. “The test question is, Were they elementary parts of the mill at the time of the sale? And, as a matter of *fact*, it is quite plain that they were not; for the mill had always run without them. No doubt they were *intended* to be made part of the mill, but we do not see how we can take the intention without fact, in order to declare what constitutes the mill. If we do, then the sale of a half-built or half-ruined house would include all the materials provided for its completion or repair.

¹ *Smith v. Moore*, 26 Ill. 392, 393, considering and correcting the opinion in the same case in 24 Ill. 512. See *Raymond v. White*, 7 Cowen, 319; *Boone v. Chiles*, 10 Peters, 224; *Lapham v. Norton*, 71 Me. 83; *Westgate v. Wixon*, 128 Mass. 304.

A very provident man is quite sure to have materials on hand which he sees will sometime be necessary for the repair of his works, or for supplying deficiencies in them; but his having them with this intention does not make them constituent parts of his works. Thus, he will provide extra saws for a sawmill, or bolting cloth for a flour-mill, or extra castings for the running gear, or lumber, nails, screws, and other materials to make improvements or repairs; but this prudence does not convert personal into real property, so long as the fact remains that they are not yet made constituent elements of the mill or other structure. That fact we can ascertain and define with reasonable certainty, but we can have no measure for the ever varying degrees of prudent forethought. And if mere intention could affix such articles to the realty, then a mere change of intention would unfix them, or prevent their becoming affixed, and we should thus be without any rule at all to guide us. Besides, it is rather a contradiction in terms to say, at the same time, that they *are* parts of the structure, and are *intended to be made so*.”¹ If mill saws have never been attached to the mill, or used in it, the fact that the owner had purchased them for the purpose of using them in his mill, and kept them there for over a year, will not constitute them fixtures so as to pass as fixtures with the mill.²

¹ Johnson v. Mehaffey, 43 Pa. St. 308; 82 Am. Dec. 568; per Lowrie, C. J.

² Burnside v. Twitchell, 43 N. H. 390. But the court held the saws actually attached to the mill, without any intention of removing them, became a part of the realty. Sargent, J., in the course of the opinion, said: “As to the sixteen saws never used, they cannot be said to have been so affixed. They were never set in the mill or used there, or in any way attached to it, or any part of it. The mere fact that they were purchased with the intention to be used there is not sufficient to make them fixtures. If they had been once affixed, and had been taken out to repair or to file, while the others were at work in their place, the case would be different, for they would none the less be parts of the mill when thus removed for a temporary purpose than when in actual use. Articles once affixed and used in such a way as to become parts of the freehold, though disannexed at the time of the sale for a temporary purpose, still pass by the conveyance of the real estate: Despatch Line of Packets

§ 1224. **Same subject, continued.**—Where a grantor had hauled posts and timber to his farm, it was decided that his simple intention, formed before the sale of the farm, to erect the posts into a fence, and the timber into a granary, was not, in the absence of any effort to do so, sufficient to convert the property into realty, and that, therefore, the posts and timber did not pass to the purchaser.¹ When an article has become permanently affixed to the freehold and acquired the nature of a fixture, a mere intention on the part of the owner to remove, unaccompanied by any acts showing such an intention, cannot convert it again into personalty. The owner possesses the undoubted power of severing any article from the realty, and making it personalty. But where this has not been practically accomplished, a purchaser is entitled by his deed to everything connected with the freehold in a fixed and permanent manner. To recognize any other rule would open the door to the perpetration of the greatest frauds. Any rule of a different character would make the unexpressed will of the owner the only guide, and in every case the question as to what articles passed by a

v. Bellamy Mfg. Co., 12 N. H. 232; 37 Am. Dec. 203; *Lathrop v. Blake*, 23 N. H. 66, and cases cited. But we think that the saws that had been set and used in the mill for a year or more (and as long as it would seem as the mill was used), while thus in use, were as much a part of the mill as the water wheel or the carriage. They were made fast to portions of the mill by bolts or keys, or in some way, depending somewhat upon whether they were circular or upright saws, which the case does not show. Machines and other articles essential to the occupation of a building, or to the business carried on in it, and which are affixed or fastened to the freehold and used with it, partake of the character of real estate, become part of it, and pass by a conveyance of the land. Nor does so much depend upon the character of the fastening, whether it be slight or otherwise, as does upon the nature of the article and its use as connected with the use of the freehold: *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 232, 233; 37 Am. Dec. 203, and cases cited." See *Hendy v. Dinkerhoff*, 57 Cal. 3; 40 Am. Rep. 107.

¹ *Cook v. Whiting*, 16 Ill. 480. See *Manchester Mills v. Rundlett*, 23 N. H. 271; *Tripp v. Armitage*, 4 Mees. & W. 687; s. c. 8 Law J. (N. S.) Ex. 107; *Johnson v. Hunt*, 11 Wend. 135; *Conklin v. Parsons*, 1 Chand. 240; s. c. 2 Pinn. 264; *Ripley v. Paige*, 12 Vt. 353; *Peck v. Batchelder*, 40 Vt. 233; 94 Am. Dec. 392; *Hedge's case*, 1 Leach Cr. Law, 240; *Ewell on Fixtures*, 39.

deed would be involved in inextricable confusion.¹ And testimony is inadmissible to show a secret and unaccomplished intention of the grantor for the purpose of controlling the facts and circumstances determined by the law itself.²

§ 1224 a. **Evidence of conversations.**—Still where, owing to the conflicting evidence as to the movable character of certain articles claimed as fixtures, there exists a doubt as to whether the owner intended that they should be moved to another tract, evidence of conversations had with him showing his intention is admissible.³ And in all cases, the intention, when clearly ascertained, with which an article has been attached to the realty is entitled to much consideration, and in many cases has been the controlling circumstance by which the question as to whether it should be treated as a fixture has been decided.⁴

¹ *Tate v. Blackburne*, 48 Miss. 1; *Bratton v. Clawson*, 2 Strob. 478. See, also, *Snedeker v. Warring*, 12 N. Y. 178; *Rogers v. Brokaw*, 25 N. J. Eq. 496; *Treadway v. Sharon*, 7 Nev. 37; *Noble v. Sylvester*, 42 Vt. 146; *Selger v. Pettit*, 77 Pa. St. 437.

² *Wadleigh v. Janvrin*, 41 N. H. 503; 77 Am. Dec. 780. The intention to make the article a permanent fixture should plainly appear: *Weathersby v. Sleeper*, 42 Miss. 732; *Cole v. Roach*, 37 Tex. 413; *Teaff v. Hewitt*, 1 Ohio St. 511, 533; 59 Am. Dec. 634; *Hunt v. Mullanphy*, 1 Mo. 508; 14 Am. Dec. 300; *Fortman v. Goepper*, 14 Ohio St. 558; *Hill v. Wentworth*, 28 Vt. 428; *Capen v. Peckham*, 35 Conn. 88, 95. But the intention to make a permanent annexation may be presumed from the permanent improvement to the freehold effected thereby. See *Wilde v. Waters*, 16 Com. B. 637; *Brearley v. Cox*, 24 N. J. L. 287; *Potter v. Cromwell*, 40 N. Y. 287; 100 Am. Dec. 485; *Lancaster v. Eve*, 5 Com. B., N. S., 717; *Tift v. Horton*, 53 N. Y. 377; 13 Am. Rep. 537; *Holland v. Hodgson*, Law R. 7 Com. P. 328; *Baldwin v. Walker*, 21 Conn. 168; *Ogden v. Stock*, 34 Ill. 522; 85 Am. Dec. 332. See, also, *Smith v. Moore*, 26 Ill. 394; *Huebschmann v. McHenry*, 29 Wis. 655.

³ *Benedict v. Marsh*, 127 Pa. St. 309.

⁴ *Despatch Line v. Bellamy Mfg. Co.* 12 N. H. 205; 37 Am. Dec. 203; *Langdon v. Buchanan*, 62 N. H. 257; *Cavis v. Beckford*, 62 N. H. 229; *Schaper v. Bibb*, 71 Md. 145; *Stevens v. Rose*, 69 Mich. 259; *Padgett v. Cleveland*, 33 S. C. 339; *National Bank v. North*, 160 Pa. St. 303; *Maguire v. Park*, 140 Mass. 21; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519; 15 Am. St. Rep. 235; *Southbridge Sav. Bank v. Exeter Machine Works*, 127 Mass. 542; *McRea v. Central Nat. Bank*, 66 N. Y. 489; *Turner v. Wentworth*, 119 Mass. 459; *Peet v. Dakota etc. Ins. Co.*, 1 S. Dak. 462; *Ottumwa Woollen Mill Co. v. Hawley*, 44 Iowa, 57; 24 Am. Rep. 719;

§ 1225. **Gas-fixtures.**—The weight of authority in this country is to the effect that gas-fixtures screwed on to the gaspipes of a building are chattels, and do not pass by a deed of the premises. "Gaspipes which run through the walls and under the floors of a house are permanent parts of the building, but the fixtures attached to these pipes are not. They are not permanently annexed, but simply screwed on projections of the pipes from the walls left for that purpose, and can be detached by simply unscrewing them."¹ And as these articles are considered

Allen v. Mooney, 130 Mass. 155; *Rogers v. Prattville Mfg. Co.*, 81 Ala. 483; 60 Am. Rep. 171; *Tillman v. De Lacy*, 80 Ala. 103; *Aldine Mfg. Co. v. Barnard*, 84 Mich. 632; *Ferris v. Quimby*, 41 Mich. 202; *Smith Paper Co. v. Servin*, 130 Mass. 511; *Hill v. National Bank*, 97 U. S. 450; *Hubbell v. East Cambridge Bank*, 132 Mass. 447; 42 Am. Rep. 446; *Manwaring v. Jenison*, 61 Mich. 117; *Smith v. Blake*, 96 Mich. 542; *Crippen v. Morrison*, 13 Mich. 23; *Hinkley E. Iron Co. v. Black*, 70 Me. 473; 35 Am. Rep. 346; *Quinby v. Manhattan etc. Co.*, 24 N. J. Eq. 460; *Stevens v. Rose*, 69 Mich. 259; *Morrison v. Berry*, 42 Mich. 389; 36 Am. Rep. 446; *Wheeler v. Bedell*, 40 Mich. 693; *Robertson v. Corsett*, 39 Mich. 777; *Fratt v. Whittier*, 58 Cal. 126; 41 Am. Rep. 251; *Lavenson v. Standard Soap Co.*, 80 Cal. 245; 13 Am. St. Rep. 147; *Foote v. Gooch*, 96 N. C. 265; 60 Am. Rep. 411; *Benedict v. Marsh*, 127 Pa. St. 309; *Ege v. Kille*, 84 Pa. St. 333; *Morris' Appeal*, 88 Pa. St. 368; *Tolles v. Winton*, 63 Conn. 440; *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163; 39 Am. St. Rep. 166; *Harmony Building Assn. v. Berger*, 99 Pa. St. 320; *Hill v. Sewald*, 53 Pa. St. 271; 91 Am. Dec. 209; *Harrisburg Electric Light Co. v. Goodman*, 129 Pa. St. 206; *New Chester Water Co. v. Holly Mfg. Co.*, 3 U. S. App. 264; 3 C. C. A. 399; 53 Fed. Rep. 19; *Capen v. Peckham*, 35 Conn. 88; *Stockwell v. Campbell*, 39 Conn. 362; 12 Am. Rep. 393; *Alvord Carriage Mfg. Co. v. Gleason*, 36 Conn. 86; *Meigs' Appeal*, 62 Pa. St. 28; 1 Am. Rep. 372; *Seeger v. Pettit*, 77 Pa. St. 437; 18 Am. Rep. 452; *Vail v. Weaver*, 132 Pa. St. 363; 19 Am. St. Rep. 598; *Benedict v. Marsh*, 127 Pa. St. 309; *Hill v. Wentworth*, 28 Vt. 428; *Cherry v. Arthur*, 5 Wash. St. 787; *Binkley v. Forkner*, 117 Ind. 176; *Eaves v. Estes*, 10 Kan. 314; 15 Am. Rep. 345; *Jones v. Bull*, 85 Tex. 136; *Atchison etc. Ry. Co. v. Morgan*, 42 Kan. 23; 16 Am. St. Rep. 471; *Docking v. Frazell*, 38 Kan. 420; *Walker v. Flouring Mill Co.*, 70 Wis. 92; *Taylor v. Collins*, 51 Wis. 123; *Arnold v. Crowder*, 81 Ill. 56; 25 Am. Rep. 260; *Fletcher v. Kelly*, 88 Iowa, 475; *Johnson v. Mosher*, 82 Iowa, 29; *Elliott v. Wright*, 30 Mo. App. 217; *Harkey v. Cain*, 69 Tex. 146; *Willis v. Morris*, 66 Tex. 628; 59 Am. Rep. 634; *Moody v. Aiken*, 50 Tex. 65.

¹ *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38, 40; 37 Am. Rep. 471, per Rapallo, J; *Shaw v. Lenke*, 1 Daly, 487; *Vaughen v. Haldeman*, 33 Pa. St. 522; 75 Am. Dec. 622; *Montague v. Dent*, 10 Rich. 135; 67 Am. Dec. 572; *Rogers v. Crow*, 40 Mo. 91; 93 Am. Dec. 299. In *Shaw*

mere personal property, they will not pass to a purchaser by a sheriff's deed made upon the sale of real estate.¹ But in some courts, the view is taken that the gasaliers are a part of the gaspipes, and being necessary to the practical enjoyment of the gaspipes, should be classed as fixtures.² But the pipes upon which the fixtures are screwed do not pass by a deed as fixtures.³ While the general rule is that gasfixtures are chattels, and do not pass by deed of the premises, yet the intention of the owner, shown by other acts, may convert them into fixtures; and they may by virtue of these acts pass to the grantee. Thus, the owner of a house, as an inducement to a person to purchase, told him, during the negotiations for the sale, that the house was complete and ready to move into, and that "all he had to do was to walk in and light the gas," as it was complete. After the sale the former owner brought an action to recover the gas-fixtures on the ground that they did not pass by the deed; it was held, however, that the gasfixtures became attached to the freehold, and passed by a deed of it, for the reason that the statement made as an

v. Lenke, supra, Brady, J., said: "The adjustment of the bracket or chandelier to the gaspipe is not such actual annexation to the freehold as is contemplated by law. The fixture itself, though employed for a useful purpose, and often highly ornamental, is not indispensable to the enjoyment of the realty. It forms no part of the soil by annexation, actual contract, or otherwise. It is not fastened to the wall, and it can be removed without injury either to the wall, freehold, or pipe to which it is attached. In addition to this, it may be said with propriety that it has become by usage and general concession as much an article of furniture as a mirror or carpet, although not so universally owned." See also *Jarechi v. Philharmonic Society*, 79 Pa. St. 403; 21 Am. Rep. 78; *Towne v. Fiske*, 127 Mass. 125; 34 Am. Rep. 353; *Lawrence v. Kemp*, 1 Duer, 363; *Heysham v. Dettre*, 89 Pa. St. 506; *Guthrie v. Jones*, 108 Mass. 191; *Seeger v. Pettit*, 77 Pa. St. 437; 18 Am. Rep. 452; *Chapman v. Union Mut. L. Ins. Co.*, 4 Ill. App. 29; *Hays v. Doane*, 11 N. J. Eq. 84. But see *contra*, *Johnson v. Wiseman*, 4 Met. (Ky.) 357; 83 Am. Dec. 475.

¹ *Vaughen v. Haldeman*, 33 Pa. St. 522; 75 Am. Dec. 622.

² *Sewell v. Angerstein*, 18 L. T. 300; *Ex parte Wilson*, 2 Mont. & A. 61; *Johnson v. Wiseman*, 4 Met. 357; 83 Am. Dec. 475; *Ex parte Acton*, 4 L. T., N. S., 261. See *Smith v. Commonwealth*, 14 Bush, 31; 29 Am. Rep. 402.

³ *Ex parte Acton*, 4 L. T., N. S., 261; *Ex parte Wilson*, 2 Mont. & A. 61.

inducement to the purchase demonstrated that the gas-fixtures had been attached to the house to increase its general value, and not for temporary use.¹

§ 1226. **Manure.**—All manure which is made in the ordinary course of husbandry, and which, at the time of the execution of the deed, is upon the premises, will pass, by the deed, as an incident to the land, unless it is expressly reserved. "It must be regarded as settled in this State, that as between grantor and grantee, all manure made in the ordinary course of carrying on the farm, and which is upon the premises at the time of the sale and conveyance, will pass to the grantee as an incident to the land conveyed, unless there be a reservation in the deed; and that it makes no difference whether it be in the field, or in the yard, or in heaps at the windows, or under cover. It is an incident and appurtenance to the land, and passes with it, like the fallen timber and trees, the loose stones lying upon the surface of the earth, and like the wood and stone fences erected upon the land, and the materials of such fences, when placed upon the ground for use, or accidentally fallen down."² In New Jersey, while it is ad-

¹ *Funk v. Brigaldi*, 4 Daly, 359.

² *Plumer v. Plumer*, 30 N. H. (10 Fost.) 558, 568, per Eastman, J; *Snow v. Perkins*, 60 N. H. 493; 49 Am. Rep. 333; *Conner v. Coffin*, 2 Fost. 538; *Parsons v. Camp*, 11 Conn. 525; *Goodrich v. Jones*, 2 Hill, 142; *Sawyer v. Twiss*, 6 Fost. 345; *Kittredge v. Woods*, 3 N. H. 503; 14 Am. Dec. 393; *Needham v. Allison*, 4 Fost. 355; *Stone v. Proctor*, 2 Chip. D. 108; *Veheu v. Mosher*, 76 Me. 469; *Chase v. Wingate*, 68 Me. 204; 28 Am. Rep. 36; *Strong v. Doyle*, 110 Mass. 92; *Snow v. Perkins*, 60 N. H. 493; 49 Am. Rep. 333; *Hill v. De Rochemont*, 47 N. H. 88; *Perry v. Carr*, 44 N. H. 118; *Norton v. Oraig*, 68 Me. 275; *Daniels v. Pond*, 21 Pick. 367; 32 Am. Dec. 269.

In *Wetherbee v. Ellison*, 19 Vt. 379, it is held that the manure of animals, made upon a farm, whether spread about the barnyard, or lying in piles at the stable windows, or lying in piles in the stable where it has been allowed to accumulate, will pass by a deed of the freehold as appurtenant to it, and that a tenant is not entitled to remove the manure, although he owned the crops from which it was made. It was also held where the defendant, who was in the occupancy of the farm as a tenant at the time of its conveyance by the owner to the plaintiff, removed from the farm, subsequently to the conveyance, the manure which had been allowed to accumulate in the stable before that, even if as between the

mitted that manure, after it is spread upon the land, and appropriated to fertilizing purposes, becomes a part of the freehold and passes by a deed of the real estate, yet it has been decided that where land is conveyed by deed without any clause of reservation, the title to manure lying in and around the barnyard does not pass to the grantee. This decision is, however, opposed by the weight of authority, and cannot be recognized as announcing the generally accepted rule.¹ Where manure is made

defendant and the grantor of the plaintiff, the defendant had the right to remove the manure, yet in the absence of any notice, actual or constructive, to the plaintiff of his right, the intention of defendant to remove it at the time he piled it in the stable could not affect the right of plaintiff to it, where that intention was not manifested by any act sufficient to put the plaintiff upon inquiry at the time of the sale.

¹ *Ruckman v. Outwater*, 4 Dutch. (28 N. J. L.) 581. Haines, J., delivering the opinion of the court, said: "The question thus presented is, whether by the deed of conveyance of a tract of land, without any clause of reservation, the title to the manure lying in and around the barnyard where it had accumulated passed to the grantee. By an ordinary deed of conveyance of land nothing passes to the grantee but the real estate and its appurtenances, and whatsoever is attached or affixed to it, that it cannot be removed without injury to the freehold. Hence the question arises, whether manure so lying in a barnyard is a part of the real estate, or an appurtenant to it, or so attached to the freehold that it passes with it by virtue of the deed of conveyance. The question is not to be determined by the rules of law regulating fixtures, for the property in question is in no respect a fixture, an article of a personal nature affixed to the freehold, and which cannot be removed without injury to it, nor is it claimed as such. It is claimed as part of the freehold itself, an appurtenant to it, and which, for the sake of agriculture and good husbandry, should not be removed. But as between the grantor and grantee, I can discover no reason, nor can I find any satisfactory authority for such claim. Manure in the yard is as much personal property as the animals and litter from which it is produced, as much so as the grain in the barn, or the stacks of hay in the meadow. And it is not material whether it lies upon heaps or scattered around the yard, whether as thrown from the doors or windows of the stable, or where it accumulated from the droppings of the cattle. But when it is spread upon the land, and appropriated to it for fertilizing purposes, then, and not till then, does it become a part of the freehold. Posts and rails, designed for the farm, are personal property so long as they remain in piles or otherwise unappropriated; but as soon as they are converted into fence they become a part of the freehold affixed to it, so as to lose the character of personalty. As well may the timber, stones, and other materials brought together for the construction of a

in a livery-stable or out of the ordinary course of husbandry, it does not pass by a deed of the real estate. "The reasons given for holding that manure made in the ordinary course of husbandry goes with the farm, exclude the idea that when made out of the ordinary course of husbandry, it is a part of the realty."¹

§ 1227. **Permanent severance.**—As annexation, either actual or constructive, is essential to constitute a chattel a fixture, it naturally follows that when that annexation no longer exists, the article formerly attached to the realty should resume its character as personalty. Where a severance of a fixture is permanent, and not made with the intention of a re-annexation, the fixture becomes personal property, and, unless expressly enumerated in the deed, will not pass by a conveyance of the land. Thus, a fire burned down the improvements upon a piece of real estate, conveyed by a deed of trust, and some of the fixtures were removed. The trustee afterward sold the property under the trust deed, using the same description in his deed as was contained in the deed of trust. Under these circumstances, it was decided that there being no expressed intention to sell the removed fixtures, they were not conveyed by such sale, and that while the trustee might sell the fixtures as personal property, they would not pass by a sale of the ruined premises merely.² An

building be regarded as a part of the farm before the building is erected, as the manure before it is applied." See *Smithwick v. Ellison*, 2 Ired. 326; 38 Am. Dec. 697.

¹ *Proctor v. Gilson*, 49 N. H. 62, 65, per Bellows, C. J. In that case, where a deed was made of a house and stable with a small piece of land used as a backyard, but not cultivated, it was held that the manure in the stable cellar made by the horses of the grantor, a teamster, did not pass by the deed, and, also, that proof that at the time of the conveyance there was a parol agreement that the manure should pass with the land was not admissible. See, also, *Snow v. Perkins*, 60 N. H. 493; 49 Am. Rep. 333; *Perry v. Carr*, 44 N. H. 118; *Plumer v. Plumer*, 30 N. H. 558; *Farrar v. Smith*, 64 Me. 74; *Needham v. Allison*, 24 N. H. 355; *Sawyer v. Twiss*, 26 N. H. 349; *Corey v. Bishop*, 48 N. H. 146; *Lassell v. Reed*, 6 Me. 222.

² *Curry v. Schmidt*, 54 Mo. 515. Judge Adams, delivering the opinion of the court, after observing that the question was not whether the

owner of land on which there was a sawmill with the machinery therein, executed a mortgage which was foreclosed and the premises sold; the purchaser at the foreclosure sale having subsequently contracted to sell the premises to the plaintiff, the latter went into possession; the mortgagor, prior to the sale under the judgment of foreclosure, had removed a portion of the machinery, leaving the severed articles in and about the mill, where they were at the time of the sale, and of the contract to sell to plaintiff. It was held that even if the purchaser at the foreclosure sale became the owner of the severed property by virtue of his purchase of the land, his deed of the land did not convey to the plaintiff the property which had been detached from the realty.¹

§ 1228. Temporary severance.—Where the removal is for a temporary purpose merely, the articles retain their

trustee or beneficiaries in the trust could have reached the fixtures that were detached, if necessary for the payment of the debts, but whether the title to the fixtures passed by a mere sale of the ruined premises, continued: "There is nothing in the case to show that such was the intention of the parties. In my judgment the trustee could have sold the fixtures as personal property; but he had no right to sell them merely by selling the ruined premises. In the condition that the premises were in, and as they stood upon the ground when sold, those fixtures formed no part of the realty."

¹ *O'Dougherty v. Felt*, 65 Barb. 220. Mullin, J., speaking for the court, said: "By virtue of the mortgage, the mortgagee acquired a lien on all that formed a part of the realty at the time it was given, and, when he foreclosed, he had a right of action for the property severed before the foreclosure: *Southworth v. Van Pelt*, 3 Barb. 347; *Van Pelt v. McGraw*, 4 N. Y. 110. It is not material whether the remedy of the mortgagee is trover for the property severed, or an action for damages by reason of the severance. In either case, the property having ceased to be a part of the realty, a conveyance of the premises to which it was attached will not carry the articles severed. Unless personal property is mentioned in a deed of land, it will not of course, pass. So that on the sale by Stewart to the plaintiff, the property severed did not pass, even if Stewart became owner of it by virtue of his purchase on the foreclosure sale. There is no evidence that anything but the land was sold, and that did not embrace the property in question." Where a vault, forming part of the realty, is removed, the measure of damages is its value immediately preceding its removal, and not the price that might be obtained for it in open market, if removed from the building: *Rhoda v. Alameda County*, 58 Cal. 357.

character as realty, and pass to a purchaser by a deed. Thus, rails which had formed a part of a fence, but had been temporarily severed from the realty, were held to pass by a deed of the premises.¹ So it has been held that the stanchion timbers, tie-up planks, hinge staples, and tie-chains of a barn, which it was apparent had been removed for convenience in repairing the barn, passed by a conveyance of the farm and buildings.²

§ 1229. **Severance by act of God.**—If the severance occurs by an act of God, does the property become personalty, or retain its character as personalty? This may often become a question of great importance, where some lien exists upon real estate, which embraces the buildings placed thereon as a part of the land. In a case in Pennsylvania, the owner of a lot of ground, upon which a large frame building had been erected, conveyed the property in trust for the benefit of creditors; a judgment which was a lien upon the real estate conveyed had been recovered against the assignor prior to the assignment. A storm two days after the execution of the assignment demolished the building, leaving the foundation and floors nearly uninjured, but breaking the superstructure so that the materials could not be replaced. The whole was levied upon and sold upon execution based upon the judgment against the assignor, and the court, upon a controversy between the execution purchasers and the voluntary assignees, held that the ruins and fragments were real property, and passed by the sheriff's deed. Strong, J., who delivered the opinion of the court, said: "The true rule would rather seem to be, that that which was real shall continue real until the owner of the freehold shall by his election give it a different character. In *Shepherd's Touchstone*, 90, it is laid down that 'that which is parcel, or of the essence of the thing, although at the time of the

¹ *McLaughlin v. Johnson*, 46 Ill. 163. And parol proof was also held inadmissible to show what fixtures passed by the deed.

² *Wadleigh v. Janvrin*, 41 N. H. 503; 77 Am. Dec. 780; *Goodrich v. Jones*, 2 Hill, 142. See *Walker v. Sherman*, 20 Wend. 639, 640.

grant it be actually severed from it, does pass by a grant of the thing itself. And, therefore, by the grant of a mill, the millstone doth pass, although at the time of the grant it be actually severed from the mill. So by the grant of a house, the doors, windows, locks, and keys do pass as parcel thereof, although at the time of the grant they be actually severed from it.' It must be admitted that the case before us is one almost of the first impression. Very little assistance can be derived from past judicial decision. There is supposed to be some analogy between the character of these fragments of the building and that of a displaced fixture. The analogy, however, if any, is very slight. These broken materials never were fixtures, though they had been fixed to the land. They had been as much land as the soil on which they rested. Severance had never been contemplated."¹ In California, a house removed by a flood from land upon which there was a mortgage lien, was sold by the owner to a person having notice of all the facts. The court held that the severance and removal of the house from the land released the house from the operation of the lien of the mortgage, and that the purchaser had a perfect title to it.²

¹ *Rogers v. Gilinger*, 30 Pa. St. 185; 72 Am. Dec. 694. The court said further: "Nor will the *tortious* act of a stranger be allowed to injure the reversion: 2 Maule & S. 494; 1 Term. Rep. 55; *Garth v. Sir John Cotton*, 1 Ves. Sr. 524. These principles are reasserted in *Shult v. Barker*, 12 Serg. & R. 272; 7 Conn. 232; 3 Wend. 104; 20 Am. Dec. 667. Nor will a severance by the owner of that which was a part of the realty, unless the severance be with the intent to change the character of the thing severed, and convert it into personalty, prevent it passing with the land to a grantee. Thus it was held in *Goodrich v. Jones*, 2 Hill, 142, that fencing materials on a farm which have been used as part of the fences, but are temporarily detached without any intent to divert them from their use as such, are a part of the freehold, and as such pass by a conveyance of the farm to a purchaser. Is the rule different when the severance occurs not by a tortious act, nor by a rightful exercise of proprietorship, without any intent to divert the thing severed from its original use, but by the act of God? The act of God, it is said, shall prejudice no one (4 Co. 86 b), yet the maxim is not true, if a tempest be permitted to take away the security of a lien creditor, and transfer that which was his to the debtor or the debtor's assignees."

² *Buckout v. Swift*, 27 Cal. 433; 87 Am. Dec. 90. See *Clark v. Rey-*

§ 1230. **Stoves, furniture, etc.**—The general rule is, that stoves fastened in the usual way, and capable of removal without injury to the freehold, do not pass by a deed.¹ Some decisions may be found in which stoves have been declared to be fixtures, and regarded as part of the freehold. But in most of them, the attachment to the building was made in such a manner that they could not be removed without serious injury to it.² Articles of furniture, such as hangings, bookcases, carpets, mirrors, etc., though they may be fastened for a temporary purpose, do not pass by a deed of the realty.³ A cupboard made and fitted into a recess, and fastened there by nails or screws, does not pass by a conveyance of the real property.⁴ Marble slabs laid upon brackets screwed into the

burn, 1 Kan. 281; *Woehler v. Endter*, 46 Wis. 301; *Harris v. Bannon*, 78 Ky. 568; *Citizens' Bank v. Knapp*, 22 La. Ann. 117. And see *Hutchins v. King*, 1 Wall. 53; *Gardner v. Finley*, 19 Barb. 317; *Hill v. Gwin*, 51 Cal. 47; *Dorr v. Dudderar*, 88 Ill. 107.

¹ *Freeland v. Southworth*, 24 Wend. 191; *Williamson v. Bailey*, 3 Dane's Abr. 152, § 25. In *Freeland v. Southworth*, 24 Wend. 191, Bronson, J., said: "I think the stove and pipe were not affixed to the freehold, and did not pass by the conveyance of the land to the plaintiff. It is not alleged that the stove was fastened to the building in any manner whatever, and the temporary fastenings about the pipe were such as could be removed without the slightest injury to the chimney. In *Goddard v. Chase*, 7 Mass. 432, on which the plaintiff relies, the stoves were set in the chimneys so that it was necessary to pull down the fireplaces to get them out. Stoves put up in such a manner that they can be removed at pleasure, and without injury to the building, have never been considered a part of the freehold in this State. See 2 Rev. Stats., 367, § 22, and p. 83, §§ 9, 10. . . . I see nothing to distinguish this from the ordinary case of stoves put up in such a manner that they can be removed and replaced, or others substituted at pleasure, without in any way impairing the building. The stove was a part of the furniture of the house, which the vendor had a right to remove with his other goods."

² See *Goddard v. Chase*, 7 Mass. 432; *Smith v. Heiskell*, 1 Cranch C. C. 99; *Blethen v. Towle*, 40 Me. 310; *Folsom v. Moore*, 19 Me. 252; *Tuttle v. Robinson*, 33 N. H. 104.

³ *Shaw v. Lenke*, 1 Daly, 487; *Walker v. Sherman*, 20 Wend. 646; *McKeage v. Hanover F. Ins. Co.*, 81 N. Y. 38; 37 Am. Rep. 471. Mirrors, however, set into the wall as a part of the house at the time of its erection will pass: *Wane v. Kilpatrick*, 85 N. Y. 413; 39 Am. Rep. 674; *Spinney v. Barbe*, 43 Ill. App. 585.

⁴ *Blethen v. Towle*, 40 Me. 310.

walls, but not fastened to them, do not pass by a deed, and the vendor may remove them.¹

¹ *Weston v. Weston*, 102 Mass. 514. Says Morton, J: "After the judgment for possession, and before the execution was issued, he removed and carried away a number of marble and imitation marble slabs, which the plaintiff claims were fixtures, and passed to him by the conveyance from said defendant. But upon the facts reported by the auditor, we are of opinion that these slabs were not so annexed to the real estate as to become part of it. They were not attached to the wall, and could be removed without injury to the house or to themselves. They formed a part of the furniture of the rooms, useful and convenient, but not essential to the enjoyment and use of the house, and not permanently incorporated with the freehold so as to become a part of it. The plaintiff, therefore, cannot recover their value in this suit." See, also, *D'Eyncourt v. Gregory*, Law R. 3 Eq. 382; *Ex parte Morrow*, 1 Low. Dec. 386; *Rogers v. Crow*, 40 Mo. 91; 93 Am. Dec. 299; *Snedeker v. Warring*, 12 N. Y. 170. Windows and blinds, although temporarily separated from the house, pass by a deed: *Peck v. Batchelder*, 40 Vt. 233; 94 Am. Dec. 392. So will a furnace attached to the brickwork: *Stockwell v. Campbell*, 39 Conn. 362; 12 Am. Rep. 393; *Main v. Schwazwaelder*, 4 E. D. Smith, 273. As to steam radiators, see *National Bank v. North*, 160 Pa. St. 303; *Capehart v. Foster*, 61 Minn. 132; 63 N. W. Rep. 257; 52 Am. St. Rep. 582. A deed or mortgage of an opera house will pass all the furniture, pictures, and furnishings necessary for a complete opera house: *Grosvenor v. Bethell*, 93 Tenn. 577.

CHAPTER XXXIV.

RESERVATION OF VENDOR'S LIEN IN DEED.

- § 1231. Equitable mortgage.
- § 1232. Payment in specific articles.
- § 1233. Not waived by taking other security.
- § 1234. Lien reserved for benefit of another.
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- § 1245. Growing crops.
- § 1246. Negotiable note not referred to in deed.
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- § 1248. Effect of second deed.

§ 1231. **Equitable mortgage.**—The reservation of a lien in the deed by the grantor is the creation of an equitable mortgage; when the deed is recorded, every one is bound to take notice of such lien.¹ Such a lien is assignable, and where a grantor reserves in his deed a "lien on the described and granted premises for the faithful and full payment of the several notes described therein, with all interest," and transfers the notes to another, "with the

¹ Webster v. Mann, 52 Tex. 416; Davis v. Hamilton, 50 Miss. 213; Ufford v. Wells, 52 Tex. 612; Stratton v. Gold, 40 Miss. 778; Baker v. Compton, 52 Tex. 252; Hall v. Mobile etc. Ry. Co., 58 Ala. 10; Caldwell v. Fraim, 32 Tex. 310. A purchaser at a sheriff's sale will take only an equity of redemption: Davis v. Hamilton, 50 Miss. 213.

lien retained by him on the lands therein specified," the purchaser can enforce the lien against the grantee.¹

§ 1232. **Payment in specific articles.**—As a lien of this kind is an equitable mortgage, the rights of the grantor and grantee depend upon the terms of their contract, and are not conferred by mere implication of law. The lien may be security for the performance of any act agreed upon by the parties, and not alone for the payment of money. Where a person sells land, and the grantee executes his note therefor for a certain sum of money, and it is agreed at the time of the execution of the note that it may be paid in lumber at a stipulated price, and the grantee fails to pay the money or deliver the lumber, the grantee may enforce the lien, as the same is not waived by his agreement to take lumber in payment for the note.²

§ 1233. **Not waived by taking other security.**—A lien thus expressly reserved differs also from the implied vendor's lien, in that it is not waived by taking other security. "A vendor's lien is the equitable right the vendor impliedly retains of subjecting the land sold to the payment of the purchase money. It need not arise from special agreement, but merely, and usually, from an implication of law, that the seller does not intend to release his claim on the land for the purchase money. But this lien may be released by an express or an implied agreement; and it has been held that it is lost by taking security for the price of the land sold, and it is held that it is personal, and is not transferable. Being secret, it is not

¹ *Stratton v. Gold*, 40 Miss. 778. This lien is superior to a subsequent mortgage executed by the vendee: *Louisville Building Assn. v. Korb*, 79 Ky. 190.

² *Harvey v. Kelly*, 41 Miss. 490; 93 Am. Dec. 267. As the lien is a part of the deed, subsequent purchasers are as much bound by notice as they would be by a mortgage: *Moore v. Lackey*, 53 Miss. 85; *Dingley v. Bank of Ventura*, 57 Cal. 467; *Stratton v. Gold*, 40 Miss. 778; *Sidwell v. Wheaton*, 114 Ill. 267; *Webster v. Mann*, 52 Tex. 416; *Carpenter v. Mitchell*, 54 Ill. 126; *Eichelberger v. Gitt*, 104 Pa. St. 64; *Patton v. Hoge*, 22 Gratt. (Va.) 443; *Peters v. Clements*, 46 Tex. 114.

so far favored as to be sustained in favor of an assignee of the debt, for the reason that equity does not presume that the assignee looks to the land for payment, which is presumed in favor of the vendor. In this case, however, the lien is expressly reserved in the deed and conceded in the notes. It arises by express contract, and became a matter of record, and full notice to all who might deal with the property, and being conceded in the notes, all persons purchasing them are assured by their contents that a lien is conceded, not only to the vendor, but to his assigns. This, then, is more than an ordinary vendor's lien. It is a written contract that the land shall be burthened with the lien until the notes are paid. If not a mortgage, it approximates one more nearly than an ordinary vendor's lien. It declares the land to be in pledge for the payment of the purchase money. It has the same effect as if a written agreement had been entered into and signed by the parties, that there should be a lien on the land to secure the payment of the notes, and that the assignee of the notes should have the right to enforce it. When the deed and notes are considered as a part of the same transaction, it is substantially the same as such an agreement, and it will be readily conceded that equity would carry an agreement thus entered into by the parties into effect, and enforce it as it would any other lawful contract. Here are parties competent to contract, the subject matter of a contract, and a sufficient consideration and an agreement legally entered into, and no reason is suggested why it should not be enforced." ¹ Thus, the taking of additional

¹ *Carpenter v. Mitchell*, 54 Ill. 126, 129, per Mr. Justice Walker, in delivering the opinion of the court. And see, also, *Warren v. Branch*, 15 W. Va. 21, where title remains in vendor: *Knisely v. Williams*, 3 Gratt. 265; 46 Am. Dec. 193; *Hatcher v. Hatcher*, 1 Rand. 53; *Lusk v. Hopper*, 3 Bush, 179; *Price v. Lauve*, 49 Tex. 74; *Sehorn v. McWhirter*, 6 Baxt. (Tenn.) 313; *Lewis v. Pusey*, 8 Bush, 615; *Fogg v. Rogers*, 2 Cold. 290; *Dunlap v. Shanklin*, 10 W. Va. 662; *Schwarz v. Stein*, 29 Md. 112; *Strickland v. Summerville*, 55 Mo. 164; *Whitehurst v. Yandall*, 7 Baxt. (Tenn.) 228; *Adams v. Cowherd*, 30 Mo. 458; *Hurley v. Hollyday*, 35 Md. 469; *Magruder v. Peter*, 11 Gill & J. 217; *Hines v. Perkins*, 2 Heisk. 395; *Boze-*

security in the form of a trust deed for other lands does not affect the lien reserved by the deed.¹

§ 1234. **Lien reserved for benefit of another.**—It is not essential to the creation of this vendor's lien that it should be made for the exclusive benefit of the vendor, or for his benefit at all. Where it is so intended by the parties to the deed, a lien for the purchase money, payable to a stranger to the deed, may be retained for the latter's benefit, with his consent.²

§ 1235. **Grantee takes legal title.**—The grantee, of course, takes the legal title, but he takes it subject to the lien, in the same manner and to the same extent as if he had executed a mortgage. The title of the grantee may be levied upon and sold upon execution against him. The purchaser at the execution sale takes the title of the grantee subject to the lien, and an assignee of the note, given by the grantee, may enforce the lien against the execution purchaser.³

§ 1236. **Destruction of record.**—When the deed reserving the vendor's lien is recorded, notice is given to all of its existence. Although a purchaser from the grantee may have paid the full amount of the purchase money without actual knowledge of the existence of the

man *v.* Ivey, 49 Ala. 75; *McCaslin v. State*, 44 Ind. 151; *Daniels v. Moses*, 12 S. C. 130.

¹ *Price v. Lauve*, 49 Tex. 74. The lien, however, may be waived by express language, or by acts showing a clear intent to waive it: *Warren v. Branch*, 15 W. Va. 21; *Coles v. Withers*, 33 Gratt. (Va.) 186; *Byrns v. Woodward*, 10 Lea (Tenn.), 444; *Frazier v. Hendren*, 80 Va. 265; *French v. Dickey*, 3 Tenn. Ch. 302.

² *Mize v. Barnes*, 78 Ky. 506.

³ *Chitwood v. Trimble*, 58 Tenn. (2 Baxt.) 78. The lien may be reserved by a separate instrument: *Hobson v. Edwards*, 57 Miss. 128; *Carr v. Thompson*, 67 Mo. 472; *Helm v. Weaver*, 69 Tex. 143; *Eskridge v. McClure*, 2 Yerg. (Tenn.) 84; *Osborne v. Royer*, 1 Lea (Tenn.), 217. The lien may secure the performance of a collateral agreement: *Harvey v. Kelly*, 41 Miss. 490; 93 Am. Dec. 267; *Sidwell v. Wheaton*, 114 Ill. 267. It is entitled to precedence over a prior judgment against the vendee: *Parsons v. Hoyt*, 24 Iowa, 154.

lien at the time payment was made, yet the due registration of the deed in which the lien was reserved, is constructive notice to him of such lien to the same extent as actual notice would have been. If the record of the deed has been destroyed, the notice given by registration is just as operative as if there had been no destruction of the record.¹

§ 1237. **No particular form required.**—Any language which shows that the intention of the vendor was to reserve a lien is sufficient. Where a deed contains a description of the notes given for the purchase money, and in the *habendum* clause contains a recital, "to have and to hold on the payment of the notes hereinabove stated," the deed contains a sufficient reservation of a vendor's lien, and the recitals are sufficient to require a reasonable person to inquire whether the notes have been paid or not.² A statement that the land is conveyed "under and subject, nevertheless, to the payment of" a certain sum of money at the time of decease of a widow to certain children, is sufficient to reserve a lien binding subsequent purchasers.³ "There has been a manifest disposition in the courts to give a more liberal scope to the contracts of parties intended to create securities for the

¹ *Armentrout's Executors v. Gibbons*, 30 Gratt. 632. See, also, *Moore v. Lackey*, 53 Miss. 85; *White v. Downs*, 40 Tex. 225.

² *Blaisdell v. Smith*, 3 Bradw. (Ill.) 150. Allen, J., who delivered the opinion of the court, said: "It is insisted that defendants are not chargeable with notice of anything that may appear in the '*habendum*'; that it is no part of the deed; that the conveyance would be good without it. If it were true that what appears in the *habendum* they were not bound to notice, still we hold that the description of the note in the body of the deed, with the statement that it constituted part of the consideration, would be sufficient to charge them with notice under the authorities above cited. But the court is not aware of any rule or decision that requires the recital to appear in any particular part of the deed. The *habendum* clause is a part of the deed."

³ *Heist v. Baker*, 49 Pa. St. 9. See *Hutchinson v. Patrick*, 22 Tex. 318. This lien is generally treated as a mortgage: *Peters v. Clements*, 46 Tex. 114; *Robinson v. Woodson*, 33 Ark. 307; *Dingley v. Bank of Ventura*, 57 Cal. 467; *Stratton v. Gold*, 40 Miss. 778; *Carpenter v. Mitchell*, 54 Ill. 126; *Smith v. Rowland*, 13 Kan. 245; *Taliaferro v. Barnett*, 37 Ark. 511;

fulfillment of their obligations. An agreement to make a mortgage on land to secure a debt has, in equity, been construed to be a lien on the property, though the mortgage was never executed. Literally, it was but the personal engagement of the party. A security may be created on property, which is short of a grant, which does not convey or profess to convey the title, such as expressions in a conveyance that the vendor will look to the land as security for the money. No formula of words is necessary to create that right. Whatever words distinctly convey the idea that the vendor retains or reserves a lien on the land creates an express security. Such language does not create a technical mortgage, nor does it prevent the legal title from fully vesting in the purchaser; but this security follows the land, and being expressed in the deed, is notice, by reason of the registration, to creditors and purchasers."¹ Where a deed conveys land "charged with the payment" of certain specified sums, the land is subject to the charge.² If the deed recites that the land is conveyed subject to the payment of the purchase money, a lien is created.³ The fact that at the foot of such a deed there is a formal receipt for the purchase money, does not constitute even *prima facie* evidence of the satisfaction of the lien.⁴ "If the purchasers," said Mr. Justice Trunkey, "had made inquiry of the proper parties, they could have learned whether the money was actually paid, and they stand in the vendor's shoes, holding the land as if they had bought with express notice of the amount remaining unpaid. The rule is, that whatever puts a party on inquiry amounts to notice, where the inquiry becomes a duty, as in the case of a

Adams v. Cowherd, 30 Mo. 458; Ober v. Gallagher, 93 U. S. 199; Hines v. Perkins, 2 Heisk. (Tenn.) 395; Webster v. Mann, 52 Tex. 416; Bozeman v. Ivey, 49 Ala. 75; Eichelberger v. Gitt, 104 Pa. St. 64; Daniels v. Moses, 12 S. C. 130.

¹ Moore v. Lackey, 53 Miss. 85, 90, per Simrall, C. J. And see Carr v. Holbrooke, 1 Mo. 240; Pugh v. Holt, 27 Miss. 461.

² Stanhope v. Dodge, 52 Md. 483.

³ Eichelberger v. Gitt, 104 Pa. St. 64.

⁴ Eichelberger v. Gitt, 104 Pa. St. 64.

purchaser of land, and would lead to a knowledge of the requisite fact by the exercise of ordinary diligence and understanding.”¹

§ 1238. **Unrecorded vendor's lien.**—Where a vendor's lien is reserved in a separate instrument, it must be recorded in order to bind a subsequent *bona fide* purchaser for value without notice. And such a purchaser is not put upon inquiry by the fact that the parents of the grantor's wife are in possession under a recorded lease, which provides for the payment of only a nominal rent.² No additional lien is credited by a recital in a note given for land that it “is to stand as a lien on said land until fully paid.”³

§ 1239. **Reservation of lien when not provided for in contract of sale.**—When an owner of land agrees to sell it for a certain price, a portion of which is to be paid in cash at a future day, and notes are to be given by the vendee for the balance of the purchase money payable at a specified time, and it is agreed that, when these notes are given, the owner is to make to the vendee a deed with covenants of warranty, but the agreement is silent as to the reservation in the deed of the vendor's lien, or as to any security for the payment of the purchase money for which the notes are given, still, when the deed is executed, the vendor has a right to insert in it a clause by which a lien for the unpaid purchase money is reserved.⁴

§ 1240. **Verbal agreement cannot control lien.**—Where the grantor reserves in his deed a lien upon the land for the payment of the purchase price, the grantee cannot, in a suit brought to enforce such lien, set up as a defense that there was a contemporaneous verbal agreement that the grantor should not have the right to resort

¹ In *Eichelberger v. Gitt*, *supra*.

² *Moeller v. Holthaus*, 12 Mo. App. 526.

³ *Waddell v. Carlock*, 41 Ark. 523.

⁴ *Findley v. Armstrong*, 23 W. Va. 113.

to the lien on the land for the payment of the purchase money.¹

§ 1241. **Estoppel of vendor.**—A vendor who has an express lien may by his acts estop himself from deriving any benefit from it. Where a grantor had retained an express lien for the purchase price of a piece of land, but after the grantee's death allowed the administrator of his estate to suggest the insolvency of the estate, and became a witness to show the title of his grantee to the land, the claim of the grantor being the principal debt against the grantee's estate, for the payment of which, as well as other debts proved and allowed, the land was ordered to be sold, and the grantor became a competing bidder at the sale of the land, it was held that he waived his lien by his conduct, and was estopped from enforcing any lien against the purchaser, but was compelled to look to the proceeds of the sale for the payment of his debt.² And a grantor may waive by parol a lien on lumber reserved in a conditional deed to secure the purchase price of the land.³

§ 1242. **Vendor's lien and subsequent mortgage.**—A vendor's lien reserved in the deed is superior to all subsequent mortgage liens, and attaches to all structures subsequently becoming a part of the realty. Where a grantor reserves a lien, and a grantee builds a house on the land, and mortgages the house and land, the grantor has the superior lien, and may enforce it against both house and land.⁴

§ 1243. **Lien assignable.**—Where the vendor has not parted with the title, having executed only a contract of sale, or has executed a deed, but in it has reserved to

¹ *Hutchinson v. Patrick*, 22 Tex. 318. If the deed states that the land is subject to a specified indebtedness in favor of a creditor of the grantor, and that the grantee, as a part of the consideration, assumes its payment, the deed creates an express lien which the creditor of the grantor can enforce: *Sidwell v. Wheaton*, 114 Ill. 267.

² *Butler v. Williams*, 5 Heisk. 241.

³ *Stone v. Fairbanks*, 53 Vt. 145.

⁴ *Louisville Building Assn. v. Korb*, 79 Ky. 190.

himself a vendor's lien, the lien is assignable, and the assignee of the note given for the purchase money is entitled to the benefit of the security, and stands in the same position as the vendor.¹ The lien is like an express mortgage, and the vendor has the same remedies as a mortgagor for its enforcement.² Where the party in possession and his vendor had nothing but a mere equity, and the party in possession acquired his rights with notice by the recitals of the deed, under which he claims that the purchase money has not been paid, it is not necessary to make such party in possession a party in the foreclosure proceedings.³

¹ *Kimbrough v. Curtis*, 50 Miss. 117; *Sheppard v. Thomas*, 26 Ark. 617; *Walkenhorst v. Lewis*, 24 Kan. 420; *Wright v. Troutman*, 81 Ill. 374; *Stevens v. Chadwick*, 10 Kan. 406; 15 Am. Rep. 348; *Cleveland v. Martin*, 2 Head, 128; *Kelly v. Payne*, 18 Ala. 371; *Reynolds v. Morse*, 52 Iowa, 155; *Robinson v. Harbour*, 42 Miss. 795; 97 Am. Dec. 501; *Moore v. Anders*, 14 Ark. 628; 60 Am. Dec. 551; *Adams v. Cowherd*, 30 Mo. 458; *Terry v. George*, 37 Miss. 539; *Steinkemeyer v. Gillespie*, 82 Ill. 253; *Roper v. Day*, 48 Ala. 509; *Blaisdell v. Smith*, 3 Bradw. (Ill.) 150; *McClintic v. Wise*, 25 Gratt. 448; 18 Am. Rep. 694; *Campbell v. Rankin*, 28 Ark. 401; *Carpenter v. Mitchell*, 54 Ill. 126; *Dollahite v. Orne*, 2 Smedes & M. 590; *Tanner v. Hicks*, 4 Smedes & M. 294; *Tharpe v. Dunlap*, 4 Heisk. 674; *Moore v. Lackey*, 53 Miss. 85; *Wells v. Morrow*, 38 Ala. 125; *Roper v. McCook*, 7 Ala. 318; *Shall v. Biscoe*, 18 Ark. 142; *Rakestraw v. Hamilton*, 14 Iowa, 157; *Bills v. Mason*, 42 Iowa, 329; *Hall v. Click*, 5 Ala. 363; 39 Am. Dec. 327; *Rogers v. James*, 33 Ark. 77; *Martin v. O'Bannon*, 35 Ark. 62; *Wolfe v. Nall*, 62 Ala. 24; *Blair v. Marsh*, 8 Iowa, 144; *Hall v. Mobile etc. Ry. Co.*, 58 Ala. 10; *Chitwood v. Trimble*, 58 Tenn. 78. And see, also, *Shinn v. Fredericks*, 56 Ill. 439; *Bailey v. Smock*, 61 Mo. 213; *Cummings v. Oglesby*, 50 Miss. 153; *Osborn v. Royer*, 1 Lea (Tenn.), 217; *Conner v. Banks*, 18 Ala. 42; 52 Am. Dec. 209; *Young v. Atkins*, 4 Heisk. 529; *Pitts v. Parker*, 44 Miss. 247; *Murray v. Able*, 19 Tex. 213; 70 Am. Dec. 330; *Skaggs v. Nelson*, 25 Miss. 88; *Parker v. Kelly*, 10 Smedes & M. 184.

² *Micou v. Ashurst*, 55 Ala. 607; *Gaston v. White*, 46 Mo. 486; *King v. Young Men's Assn.*, 1 Woods, 386. See *Calvin v. Duncan*, 12 Bush, 101; *Johnston v. Cochrane*, 84 N. C. 446.

³ *Robinson v. Black*, 56 Tex. 215. Where several notes are given for the purchase price, the assignment of one carries with it so much of the lien as is necessary for its protection: *Griggsby v. Hair*, 25 Ala. 327; *McClintic v. Wise*, 25 Gratt. (Va.) 448; 18 Am. Rep. 694; *Summers v. Kilgus*, 14 Bush, 449; *Menken v. Taylor*, 4 Lea (Tenn.), 445; *Preston v. Ellengton*, 74 Ala. 133.

§ 1244. **Renewal of note.**—Where a note is given for the purchase money, and a lien is expressly retained in the deed to secure its payment, the note may afterward be renewed in favor of an assignee for principal and interest, and may bear interest at an increased rate, and have additional signatures, and such new note will be secured by the vendor's lien reserved in the deed.¹ But the new note must have some connection with the original transaction by novation or otherwise.²

§ 1244 a. **Extension of time of payment as against a subsequent purchaser.**—Although the land has been transferred to a subsequent purchaser, the lien may be enforced against the land, notwithstanding the original vendor has agreed with the original grantee for an extension of time of payment. The right to enforce the lien is not lost, even if the subsequent purchaser was not privy to the agreement for the extension of time, and notwithstanding the original vendee became insolvent before the expiration of the time for which payment had become extended.³ If a vendor who has executed a deed, retaining a vendor's lien for unpaid installments of the purchase price, obtains a personal judgment against the vendee for nonpayment of one of the installments, and causes the land to be sold under execution to satisfy the judgment, he cannot enforce his vendor's lien against the vendee for a default in the payment of a later installment. The grantor waives his remedy in equity by electing to proceed at law, and the title acquired by the purchaser at the execution sale is freed from any further liability for the debt.⁴ But where the vendor, instead of executing a deed, has given a bond for a deed upon the payment of the purchase money,

¹ *Byrns v. Woodward*, 10 Lea (Tenn.), 444.

² *French v. Dickey*, 3 Tenn. Ch. 302. For a case where the giving of a note was held to create a novation, see *Williams v. McCarty*, 74 Ala. 295.

³ *Dalton v. Rainey*, 75 Tex. 516; 13 S. W. Rep. 33.

⁴ *Dickason v. Eby*, 73 Mo. 133; *Outton v. Mitchell*, 4 Bibb, 239; *Lewis v. Chapman*, 59 Mo. 371; *Carter County Court v. Butler*, 81 Ky. 597.

the rule is different.¹ Where the land is sold under a decree for the enforcement of a vendor's lien, the sale releases the lien for the purchase money.² If a mortgage is not barred when the debt is, a lien reserved by contract may be enforced, although the statute of limitations has barred the debt.³

§ 1245. Growing crops.—As the lien of a mortgage attaches to the crops growing on the premises until severed from the soil, a vendor's lien created by express contract in the deed, being substantially a mortgage, has the same effect. If the land is sold for condition broken before the growing crops are severed, a purchaser is entitled to them as against the mortgagor, and all persons claiming under him.⁴

§ 1246. Negotiable note not referred to in deed.—In order that subsequent purchasers of a note given for the purchase money may enforce the vendor's lien reserved in the deed, the deed should refer to the note, so that all subsequent purchasers of the land may have notice that the note is in existence. A deed reserved a lien for the purchase money to be paid in five years, and the grantee executed a negotiable note for that amount, payable in five years, but the deed, while reserving a lien for the purchase money, did not refer to the note, or contain anything from which the existence of a note for that amount might be inferred. After the execution and delivery of the deed, the grantor indorsed and transferred the note to a bank in payment of an antecedent debt. After the transfer of the note, the grantor, to whom the note was payable, contracted to sell to a third party the land conveyed in his

¹ *Dickason v. Eby*, 73 Mo. 133. See, also, *Lewis v. Chapman*, 59 Mo. 371; *Broadwell v. Yantis*, 10 Mo. 399; *Lumley v. Robinson*, 26 Mo. 364.

² *Woods v. Ellis*, 85 Va. 471; 7 S. E. Rep. 852.

³ *Waddell v. Carlock*, 41 Ark. 523; *Bizzell v. Nix*, 60 Ala. 281; 31 Am. Rep. 38; *McPherson v. Johnson*, 69 Tex. 484; 6 S. W. Rep. 798; *White v. Blakemore*, 8 Lea, 49; *Driver v. Hudspeth*, 16 Ala. 348; *Paxton v. Rich*, 85 Va. 378; 7 S. E. Rep. 531; *Coldcleugh v. Johnson*, 34 Ark. 312.

⁴ *Yates v. Smith*, 11 Bradw. (Ill.) 459.

deed. The latter paid the purchase money and took from the original grantee a deed for the land. The second grantee was wholly ignorant of the existence of the negotiable note, and of any claim on the part of the bank to the purchase money due the original owner, and the court held that such second grantee took the property unaffected in favor of the bank holding the note.¹ "Other things

¹ *National Valley Bank of Staunton v. Harman*, 75 Va. 604. Staples, J., in delivering the opinion of the court, said: "If the deed from M. G. Harman to Asher W. Harman had mentioned the existence of a negotiable note, it might have become the duty of Mrs. O'Toole before purchasing to call for its production; the failure of the parties to produce it might justly have led to a strong suspicion that the note had passed out of the possession of Michael G. Harman into the hands of a third party. Mrs. O'Toole having constructive notice of the lien, would have the like notice of the negotiable note, and she would not be allowed to close her eyes to the facts thus communicated. But it will be observed that the deed makes no reference to any note, or to any personal obligation of the debtor whatever. The most prudent and cautious inquirer would not have supposed that any such instrument existed. Certainly, it cannot be said that persons were bound at their peril to suspect or presume it. Indeed, a negotiable note payable five years after date is altogether so unusual that no one, even the most diligent, would have ever imagined that such a security formed a part of this transaction. I repeat, therefore, that upon the record, Asher W. Harman appeared as the owner of the land, subject only to the lien for the purchase money, and upon the record M. G. Harman appeared as the owner of the lien itself, without a circumstance of suspicion to put third persons upon inquiry. A deed from the former, with a relinquishment of the lien by the latter, would convey a perfect title according to every reasonable presumption and intentment. It has been said, however, that Mrs. O'Toole ought to have made inquiry. There was no person to whom she could have applied for information touching the lien, unless it was Michael G. Harman. But why apply to him when the transaction itself to which he was engaged was the strongest possible affirmation that he was entitled to the purchase money. The rule is that a purchaser will not be charged with notice by being put on inquiry, unless he has some more authentic means of information than can be found in an application to one who is interested in concealing the truth. In 2 *Leading Cases in Equity*, pages 49, 50, it is said: 'It cannot be required of a purchaser to inquire of the vendor, or of anyone who joins him in making title, whether he is committing a fraud or breach of trust by disposing of that which belongs to a third person or has been already sold. One who is engaged in a fraudulent design seldom hesitates at a falsehood. The law exacts nothing vain or useless. To make inquiry a duty, the circumstances must be such as will lead to knowledge': 2 *Leading Cases in Equity*, pt. 1, p. 50. A party will not be considered as having notice unless, the circumstances

being equal, purchasers are favored both at law and in equity, above creditors, and so also the condition of the defendant is best. The chancellor prefers to allow a loss to rest where he finds it, rather than to transfer it to another equally entitled to his consideration; he prefers to allow rather than to inflict injustice, and to abstain from acting at all when all he can do is to shift a loss from one innocent person to another.”¹

are such that the courts can say, not only that he could have acquired, but that he ought to have acquired the notice, but for his gross negligence in the conduct of the transaction in question. See, also, *Siter, Price & Co. v. McClanachan*, 2 Gratt. 313. According to these principles, Mrs. O'Toole cannot be charged with notice, actual or constructive. We cannot attribute to her either bad faith or negligence. In short, she is a purchaser for valuable consideration without notice. Against such a purchaser, courts of equity will not take the least step imaginable, and will, on the other hand, allow him to take every advantage which the law gives him, for there is nothing which can attach itself upon his conscience in such a case in favor of an adverse claim. . . . As both the title and the lien in this case appeared upon the record, I do not think any person could be safe in taking an assignment of the latter. The form and character of the transaction were such as placed it in the power of M. G. Harman, with the concurrence of Asher W. Harman, to defraud the bank and to convey a good title to an innocent purchaser. As a matter of precaution, the bank might have indorsed the assignment and transfer of the debt on the registration of the deed. I do not mean to say that such an indorsement would constitute even constructive notice. With it, it is more than probable that Mrs. O'Toole would not have been involved in the purchase. At all events, the bank ought not to have dealt with such a security, unless it could have been placed in such a shape as would protect it as assignee, without injury to persons who might deal with the property without notice of any defect in the title. Upon such persons it cannot visit the consequences of its misplaced confidence. Nothing in my judgment could tend more to destroy confidence in titles, or more to impede the free transmission of property, than the successful assertion of secret encumbrances of this sort by strangers to the record.” As to the protection afforded a purchaser against an unrecorded assignment of mortgagee, or a cancellation of mortgage with notes outstanding, see *Henderson v. Pilgrim*, 22 Tex. 464; *Bowling v. Cook*, 39 Iowa, 200; *Bacon v. Van Schoonhoven*, 19 Hun, 158; *Turpin v. Ogle*, 4 Bradw. (Ill.) 611; *Smith v. Keohane*, 6 Bradw. (Ill.) 585; *Bank of the State of Indiana v. Anderson*, 14 Iowa, 544; 83 Am. Dec. 390; *Howard v. Ross*, 5 Bradw. (Ill.) 456; *Walker v. Schreiber*, 47 Iowa, 529; *Torrey v. Deavitt*, 53 Vt. 331.

¹ *Summers v. Kilgus*, 14 Bush (64 Ky.), 449, 452, per Coffey, J.

§ 1247. **Comments.**—As the maker of a note is allowed to make payments to the payee unless he is notified that the note has been assigned, so a purchaser should be allowed to assume that all indebtedness for the payment of which a lien has been reserved has been discharged, when the vendor has satisfied and relinquished the lien, unless such purchaser has knowledge that some other person is entitled to have the lien kept alive for his benefit. To adopt a different rule would be to encourage those secret liens and equities which it is the policy of the law to limit and defeat.

§ 1248. **Effect of second deed.**—Where a grantor expressly reserves in his deed a lien for the purchase money, and subsequently executes a second deed to the same grantee in which he acknowledges the payment of the purchase price, when in fact it is not paid, the effect of the execution of the second deed is that the lien in the first deed being a contract lien similar to a mortgage, is conveyed to the grantee, but under the second deed the grantor has the same equitable lien as if the first had never been executed.¹ In other words, the grantor occupies the same position as if nothing had been said in the first deed about a vendor's lien, but does not lose his implied lien for the payment of the purchase money.

¹ Robinson v. Woodson, 33 Ark. 307.

CHAPTER XXXV.

VENDOR'S IMPLIED LIEN.

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§ 1249. Vendor's implied lien.—The implied lien of the vendor for the unpaid purchase money, although frequently criticised, is generally recognized as a just and proper rule.¹ “Under our law, where so much strictness

¹ *Blackburn v. Gregson*, 1 Bro. Ch. 240; *Chapman v. Tanner*, 1 Vern. 267; *Thornton v. Knox*, 6 Mon. B. 74; *Tiernan v. Thurman*, 14 Mon. B. 277; *Ledford v. Smith*, 6 Bush, 129; *Emison v. Risque*, 9 Bush, 24; *McDole v. Purdy*, 23 Iowa, 277; *Jordan v. Wimer*, 45 Iowa, 65; *Grapengeth v. Fejervary*, 9 Iowa, 163; 74 Am. Dec. 336; *Johnson v. McGrew*, 42 Iowa, 555; *Boynton v. Champlin*, 42 Ill. 57; *Wilson v. Lyon*, 51 Ill. 166; *Moshier v. Meek*, 80 Ill. 79; *Gallagher v. Mars*, 50 Cal. 23; *Salmon v. Hoffman*, 2 Cal. 138; 56 Am. Dec. 322; *Burt v. Wilson*, 28 Cal. 632;

is required with regard to placing on the appropriate records evidences of liens and encumbrances, it would seem that in the absence of fraud, courts should be careful in the recognition of this lien. And yet there is much of good conscience, equity, and natural justice, in provid-

87 Am. Dec. 142; *Sparks v. Hess*, 15 Cal. 186; *Shall v. Biscoe*, 18 Ark. 142; *Refeld v. Ferrell*, 27 Ark. 534; *Keith v. Horner*, 32 Ill. 524; *Dyer v. Martin*, 4 Scam. 146; *Willard v. Reas*, 26 Wis. 540; *Pitts v. Parker*, 44 Miss. 247; *Wing v. Goodman*, 75 Ill. 159; *Kirkham v. Boston*, 67 Ill. 599; *Campbell v. Rankin*, 28 Ark. 401; *Lavender v. Abbott*, 30 Ark. 172; *Turner v. Horner*, 29 Ark. 440; *Gordon v. Bell*, 50 Ala. 213; *Wood v. Sullens*, 44 Ala. 686; *Ross v. Whitson*, 6 Yerg. 50; *Pinchain v. Collard*, 13 Tex. 333; *White v. Stover*, 10 Ala. 441; *Burns v. Taylor*, 23 Ala. 255; *Bralford v. Harper*, 25 Ala. 337; *Brown v. Christie*, 35 Tex. 689; *White v. Downs*, 40 Tex. 225; *Flanagan v. Cushman*, 48 Tex. 241; *Yarborough v. Wood*, 42 Tex. 91; 19 Am. Rep. 44; *Dodge v. Evans*, 43 Miss. 570; *Richardson v. Bowman*, 40 Miss. 782; *Hoskins v. Rowe*, 61 Iowa, 180; *Francis v. Wells*, 2 Colo. 660; *Pratt v. Clark*, 57 Mo. 189; *Carr v. Hobbs*, 11 Md. 285; *Smith v. Smith*, 9 Abb. Pr., N. S., 420; *Chase v. Peck*, 21 N. Y. 581; *Selby v. Stanley*, 4 Minn. 65; *Marsh v. Turner*, 4 Mo. 253; *Delassus v. Poston*, 19 Mo. 425; *Mattix v. Weand*, 19 Ind. 151; *Deibler v. Barwick*, 4 Blackf. 339; *Yaryan v. Shriner*, 26 Ind. 364; *Ross v. Adams*, 13 Bush, 370; *Carroll v. Van Rensselaer*, Har. (Mich.) 225; *Payne v. Avery*, 21 Mich. 524; *Duke v. Balme*, 16 Minn. 306; *Corlies v. Howland*, 26 N. J. Eq. 311; *Dudley v. Dickson*, 14 N. J. Eq. 252; *Herbert v. Scofield*, 1 Stockt. Ch. 492; *Stafford v. Van Rensselaer*, 9 Cowen, 316; *Chase v. Peck*, 21 N. Y. 581; *Anketel v. Converse*, 17 Ohio St. 11; 91 Am. Dec. 115; *Williams v. Roberts*, 5 Ohio, 35; *Brush v. Kinsley*, 14 Ohio, 20; *Pease v. Kelly*, 3 Or. 417; *Kent v. Gerhard*, 12 R. I. 92; 34 Am. Rep. 612; *Ford v. Smith*, 1 McAr. 592; *Wooten v. Bellingr*, 17 Fla. 289; *Ransom v. Brown*, 63 Tex. 188; *Bradford v. Marvin*, 2 Fla. 463; *Blackburne v. Gregson*, 1 Cox, 90; 1 Bro. Ch. 420; *Ahrend v. Odiorne*, 118 Mass. 261; 19 Am. Rep. 449; *Mackreth v. Symmons*, 15 Ves. 329; *Hill v. Grigsby*, 32 Cal. 55; *Baum v. Grigsby*, 21 Cal. 172; 81 Am. Dec. 153; *Kelly v. Karsner*, 81 Ala. 500; *Woodall v. Kelly*, 85 Ala. 368; 7 Am. St. Rep. 57; *Crampton v. Prince*, 83 Ala. 246; 3 Am. St. Rep. 718; *Betts v. Sykes*, 82 Ala. 378; *Burton v. Henry*, 90 Ala. 281; *Jackson v. Stanley*, 87 Ala. 270; *Jones v. Lockard*, 89 Ala. 575; *Weaver v. Brown*, 87 Ala. 533; *Cordova Coal Co. v. Long*, 91 Ala. 538; *Strong v. Strong*, 126 Ill. 301; *Gruhn v. Richardson*, 128 Ill. 178; *Scheffer v. Adams*, 13 Colo. 582; *Erickson v. Smith*, 79 Iowa, 374; *Gessner v. Palmateer*, 89 Cal. 89; *Bancroft v. Cosby*, 74 Cal. 583; *Fitzell v. Leaky*, 72 Cal. 477; *Avery v. Clark*, 87 Cal. 619; 22 Am. St. Rep. 272; *Springfield etc. R. R. Co. v. Stewart*, 51 Ark. 285; *Chapman v. Chapman*, 55 Ark. 452; *Otis v. Gregory*, 111 Ind. 504; *Hawes v. Chaille*, 129 Ind. 435; *Strohm v. Good*, 113 Ind. 93; *Yettey v. Fitts*, 113 Ind. 34; *Nysewander v. Lowman*, 124 Ind. 584; *Brower v. Witmeyer*, 121 Ind. 83; *Baltimore etc. Turnpike*

ing that the vendor shall not be regarded as having lost all dominion over his property until he is paid the agreed price. This lien or trust, though formerly objected to as being in contravention of the policy of the statute of frauds, and for other reasons, is now firmly established. Its necessity is, indeed, too apparent, the beneficial consequences too clear, and its equitable existence too well sustained, to need now either authority or reason to prove its origin or design."¹ But "these equitable liens on real estate are generally unknown to the world, and frequently operate injuriously on the rights of creditors and purchasers, and ought not to be enforced but in cases where the right is clearly and distinctly made out."² In many States, this rule of the vendor's implied lien never existed, or has been abolished by statute.³

Co. v. Moale, 71 Md. 353; *Walsh v. McBride*, 72 Md. 45; *Acton v. Waddington*, 46 N. J. Eq. 16; *Balow v. Farmers' Mut. F. Ins. Co.*, 77 Mich. 540; *Donovan v. Donovan*, 85 Mich. 63; *Dunton v. Outhouse*, 64 Mich. 419; *Waterfield v. Wilber*, 64 Mich. 642; *Richards v. Shingle etc. Co.*, 74 Mich. 57; *Wisconsin Marine etc. Bank v. Filer*, 83 Mich. 496; *Strong v. Ehle*, 86 Mich. 42; *Christy v. McKee*, 94 Mo. 241; *Melcher v. Derkum*, 44 Mo. App. 650; *First Nat. Bank v. Salem Capital Flour Mills Co.*, 39 Fed. Rep. 89; *Gee v. McMillan*, 14 Or. 268; 58 Am. Rep. 315; *Peters v. Tunnell*, 43 Minn. 473; 19 Am. St. Rep. 252; *Law v. Butler*, 44 Minn. 482; *Bell v. Blair*, 65 Miss. 191; *Seymour v. McKinstry*, 106 N. Y. 230; *Evans v. Enloe*, 70 Wis. 345; *Cate v. Cate*, 87 Tenn. 41; *Hamblen v. Folts*, 70 Tex. 136; *Howe v. Harding*, 76 Tex. 17; 18 Am. St. Rep. 17; *Johnson v. Townsend*, 77 Tex. 639; *Wright v. Campbell*, 82 Tex. 388; *McMichael v. Jarvis*, 78 Tex. 671; *McCamly v. Waterhouse*, 80 Tex. 340.

¹ *Pierson v. David*, 1 Iowa (Clarke), 23, 27, per Mr. Chief Justice Wright. And see *Porter v. City of Dubuque*, 20 Iowa, 440.

² *Conover v. Warren*, 1 Gilm. 498, 502, per Treat, J; 41 Am. Dec. 196.

³ *Simpson v. Mundee*, 3 Kan. 172; *Smith v. Rowland*, 13 Kan. 245; *Brown v. Simpson*, 4 Kan. 76; *Greeno v. Barnard*, 18 Kan. 518; *Kaufelt v. Bower*, 7 Serg. & R. 64; 10 Am. Dec. 428; *Stephen's Appeal*, 38 Pa. St. 9; *Hepburn v. Snyder*, 3 Pa. St. 72; *Hiester v. Green*, 48 Pa. St. 96; 86 Am. Dec. 569; *Philbrook v. Delano*, 29 Me. 410; *Gilman v. Brown*, 1 Mason, 191; *Henderson v. Burton*, 3 Ired. Eq. 259; *Cameron v. Mason*, 7 Ired. Eq. 180; *Womble v. Battle*, 3 Ired. Eq. 182; *Jones v. James*, 56 Ga. 325; *Chapman v. Beardsley*, 31 Conn. 115; *Atwood v. Vincent*, 17 Conn. 575; *Watson v. Wells*, 5 Conn. 468; *Meigs v. Dimock*, 6 Conn. 458; *Ahrend v. Odiorne*, 118 Mass. 261; 19 Am. Rep. 449; *Edminster v. Higgins*, 6 Neb. 265; *Warren v. Branch*, 15 W. Va. 21. And see, *Code, Georgia*, 1873, § 1997; *Virginia*, 1873, ch. 115, § 1; *Vermont Stats.*, 1851,

§ 1250. **Independent of agreement.**—The vendor's lien spoken of in this chapter is not dependent upon the agreement of the parties, but is an equitable right implied by law. Its enforcement is not prevented by a verbal agreement by the grantee to reconvey the land to the grantor in case of a failure to pay the purchase price. Such an agreement is void under the statute of frauds.¹ "The lien exists, although there be no special agreement for that purpose, and notwithstanding the vendor conveys the land by deed, and takes the note or bond of the vendee for the purchase money. To the extent of the lien the vendee becomes a trustee for the vendor, and his heirs, etc., and all other persons claiming under him, with such notice, are treated as in the same predicament. The principle upon which courts of equity have proceeded in establishing this lien, in the nature of a trust, is, that a person who has gotten the estate of another ought not, in conscience, as between them, to be allowed to keep it, and not pay the full consideration money. And third persons having full knowledge that the estate has been so obtained, ought not to be permitted to keep it, without making such payment, for it attaches to them, also, as a matter of conscience and duty. It would otherwise happen that the vendee might put another person in a predicament better than his own, with full notice of all the facts."²

ch. 47; Gen. Stats. 1862, ch. 65, § 33; *Arlin v. Brown*, 44 N. H. 102; 1 *Jones on Mort.*, § 191; *Chilton v. Braiden*, 2 Black, 458; *Bayley v. Greenleaf*, 7 Wheat. 46; *McLearn v. McLellan*, 10 Peters, 625. See *Kelly v. Ruble*, 11 Or. 75. In the Federal courts, the rule is recognized when it prevails in the State where the land affected is situated: *Cardova v. Hood*, 17 Wall. 1; *Chilton v. Braiden*, 2 Black, 458; *Bayley v. Greenleaf*, 7 Wheat. 46; *Coos Bay Wagon Road Co. v. Crocker*, 6 Sawy. 574; *First Nat. Bank v. Salem Capital Flour Mills Co.*, 39 Fed. Rep. 89.

¹ *Gallagher v. Mars*, 50 Cal. 23. See *Bennett v. Shipley*, 82 Mo. 448.

² *Shall v. Biscoe*, 18 Ark. 142, 157, per Mr. Chief Justice English. For various cases concerning vendor's liens, generally, see, *Hawk v. Leverett*, 71 Ga. 675; *Loomis v. Davenport & St. Paul R. R. Co.*, 3 McCrary C. O. 489; 17 Fed. Rep. 301; *Nutter v. Fouch*, 86 Ind. 451; *Cross v. Burlington & Southwestern Ry. Co.*, 58 Iowa, 62; *Butterfield v. Okie*, 36 N. J. Eq. 482; *Wooters v. Hollingsworth*, 58 Tex. 371; *Louisville Building Assn.*

§ 1251. **Receipt for consideration.**—Although the grantor may acknowledge in the deed the receipt of the purchase money, such acknowledgment does not preclude him from enforcing the lien, when in fact it has not been paid.¹ The recital of the payment of the consideration must be overcome by evidence. But though the evidence adduced for that purpose may be slight, yet if it was sufficient to satisfy the jury, an appellate court will not disturb the judgment.²

§ 1252. **Payment by another.**—The vendor's lien is one that exists in his favor. If a person advance money to the vendee to make payments on the land purchased, or if at the vendee's request he pays the amount due to

v. Korb, 79 Ky. 190; *Clay's Succession*, 34 La. Ann. 1131; *Byrns v. Woodward*, 10 Lea (Tenn.), 444; *Murray v. Witte*, 16 S. C. 504; *Wright v. Heffner*, 27 Tex. 518; *Bergeron v. Pattin*, 34 La. Ann. 534; *McCarty v. Williams*, 69 Ala. 174; *Lewis v. Cranmer*, 36 N. J. Eq. 124; *Ware v. Curry*, 67 Ala. 274; *Kingsbury v. Milner*, 69 Ala. 502; *Evans v. Feeny*, 81 Ind. 532; *Fleece v. O'Rear*, 83 Ind. 200; *Brown v. Barrett*, 75 Mo. 275; *Exchange & Deposit Bank v. Stone*, 80 Ky. 109; *Young v. Harris*, 36 Ark. 162; *Coos Bay Wagon Road Co. v. Crocker*, 6 Sawy. 574; *Glaze v. Watson*, 55 Tex. 563; *White v. Blakemore*, 8 Lea (Tenn.), 49; *Jones v. Lagland*, 4 Lea (Tenn.), 539; *Bowman v. Faw*, 5 Lea (Tenn.), 472; *Hume v. Dixon*, 37 Ohio St. 66; *Marchand v. Frellsen*, 105 U. S. 423; *Menken v. Taylor*, 4 Lea (Tenn.), 445; *Stone v. Fairbanks*, 53 Vt. 145; *Dickason v. Eby*, 73 Mo. 133; *Rogers v. Blum*, 56 Tex. 1; *Jarman v. Farley*, 7 Lea (Tenn.), 141; *Sharp v. Fly*, 9 Baxt. 4; *Ross v. Swan*, 7 Lea (Tenn.), 463; *Berry v. Ginaca*, 6 Sawy. 390; *Wynn v. Rosette*, 66 Ala. 517; *Dugge v. Stumpe*, 73 Mo. 513; *Robinson v. Black*, 56 Tex. 215; *Carey v. Boyle*, 53 Wis. 574; *Thomas v. Bridges*, 73 Mo. 530; *Dance v. Dance*, 56 Md. 433; *Alabama v. Stanton*, 5 Lea (Tenn.), 423; *National Valley Bank v. Harman*, 75 Va. 604; *Chandler v. Chandler*, 78 Ind. 417; *Cassaday v. Frankland*, 55 Tex. 452; *Vail v. Drexel*, 9 Ill. App. 439; *Whitten v. Saunders*, 75 Va. 563; *Edmonson v. Phillips*, 73 Mo. 57; *Gaston v. Dashiell*, 55 Tex. 508; *Rowell v. Williams*, 54 Wis. 636; *Mueiler v. Brigham*, 53 Wis. 173; *Robbins v. Magee*, 76 Ind. 381.

¹ *Holman v. Patterson*, 29 Ark. 357; *Tribble v. Oldham*, 5 Marsh. J. J. 137; *Mackreth v. Symmons*, 15 Ves. 329; *Sheratz v. Nicodemus*, 7 Yerg. 9; *Cuney v. Bell*, 34 Tex. 177; *Scott v. Orbison*, 21 Ark. 202; *Gilman v. Brown*, 1 Mason, 191; *Gordon v. Manning*, 44 Miss. 756.

² *Cuney's Executors v. Bell*, 34 Tex. 177. Attorneys' fees may be collected in a suit to enforce the lien when the note contains a clause obligating the vendee to pay the attorneys' fees in case suit is brought on the note: *Neese v. Riley*, 77 Tex. 348; *Johnson v. Durner*, 88 Ala. 580.

the vendor, who thereupon executes a deed to the purchaser, the person making this advance has not a vendor's lien upon the land.¹ But a third person, to whom the grantee, at the grantor's request, has agreed to pay a part of the purchase price, may enforce the lien.² Thus, where the purchaser assumes, as a part of the purchase price, the payment of a sum due by a vendor to another, the latter can claim a vendor's lien.³

§ 1253. **Homestead.**—Although the land is subject to a vendor's lien, this does not prevent the creation of a homestead, but the homestead is subordinate to the lien. After the homestead has been created, it requires the wife's assent to charge the land by an agreement to pay interest in addition to the consideration price. The husband alone cannot do this.⁴ Where, for the purpose of preventing the enforcement of a vendor's lien against a party's homestead, another lent him money to pay off the lien, taking a mortgage on the property for the amount advanced, and subsequently, on the cancellation of this mortgage, taking a new note for the amount due with interest, with the recital that it was for the purchase

¹ *Chapman v. Abrahams*, 61 Ala. 108; *Gray v. Baird*, 4 Lea (Tenn.), 212. See *Preston v. McMillan*, 58 Ala. 84; *Tilford v. Torrey*, 53 Ala. 120. See as to the vendor's reserved lien, § 1234, *ante*.

² *Latham v. Staples*, 46 Ala. 462; *Francis v. Wells*, 2 Colo. 660; *Thompson v. Thompson*, 3 Lea (Tenn.), 126; *Mitchell v. Butt*, 45 Ga. 162; *Campbell v. Roach*, 45 Ala. 667. See *Mize v. Barnes*, 78 Ky. 506; *Knox v. McCain*, 13 Lea (Tenn.), 197.

³ *De L'Isle v. Moss*, 34 La. Ann. 164; *Carver v. Eads*, 65 Ala. 190. Where a party paid for certain real estate for the use of a church as a parsonage and dwelling for the priest of such church, under an agreement that he was to have a lien on such property, and an equitable title to it, until he was repaid, and where the deed was made according to the policy of the church to the bishop who was a mere volunteer, paying nothing therefor, it was held that the person furnishing the money had a lien against the real estate in the hands of the bishop: *Dwenger v. Branigan*, 95 Ind. 221.

⁴ *McHendry v. Reilly*, 13 Cal. 75. See, also, *Williams v. Young*, 17 Cal. 403; *Bradley v. Curtis*, 79 Ky. 327; *Berry v. Boggess*, 62 Tex. 239; *Claybrooks v. Kelly*, 67 Tex. 634.

money of the homestead, the court held that there was a lien in his favor.¹

§ 1254. **Presumption of lien.**—Unless it is evident that the vendor has waived the lien, it is presumed to exist.² And it may be enforced against the heirs of the grantee.³ If a grantor take other property, the title being covenanted by the grantee, the lien is waived when it is apparent that the grantor has shown his intention to rely upon that protection.⁴ The lien covers the right of the widow to dower in the land.⁵ The lien is confined to the amount due on the sale, and will not secure any indebtedness due for other causes.⁶ The vendor is entitled to the lien when only a mere equitable interest is sold.⁷ If the vendor induces a person to purchase the property as unencumbered, by representing that the lien no longer exists, or would not be insisted upon, he may be estopped from claiming the lien.⁸ The vendor is not entitled by virtue of his lien to claim any of the profits of the land.⁹

¹ *Hicks v. Morris*, 57 Tex. 658.

² *Wilson v. Lyon*, 51 Ill. 166; *Allen v. Bennett*, 8 Smedes & M. 672; *Dodge v. Evans*, 43 Miss. 570; *Truebody v. Jacobson*, 2 Cal. 269; *Gilman v. Brown*, 1 Mason, 191; *Fry v. Prewett*, 56 Miss. 783; *Garson v. Green*, 1 Johns. Ch. 308; *Schnebly v. Ragan*, 7 Gill & J. 120; 28 Am. Dec. 195; *Clark v. Hall*, 7 Paige, 382; *Bennett v. Shipley*, 82 Mo. 448; *Coos Bay Wagon Road Co. v. Crocker*, 6 Sawy. 574; *Stringfellow v. Ivie*, 73 Ala. 213; *Carver v. Eads*, 65 Ala. 190; *Wilkinson v. May*, 69 Ala. 33; *Joiner v. Perkins*, 59 Tex. 300. Where the vendor has necessarily expended money for improvements, which the vendee under the contract of sale should have made, the amount expended may be considered as unpaid purchase money for which a lien exists: *Grove v. Miles*, 71 Ill. 376.

³ *Shirley v. Sugar Refinery*, 2 Edw. Ch. 505; *Bayley v. Greenleaf*, 7 Wheat. 46; *Warner v. Van Alstyne*, 3 Paige, 513.

⁴ *Hare v. Van Deusen*, 32 Barb. 92; *Coit v. Fougere*, 36 Barb. 195.

⁵ *Boyd v. Martin*, 9 Heisk. 382; *Fisher v. Johnson*, 5 Ind. 492.

⁶ *Refeld v. Ferrell*, 30 Ark. 465.

⁷ *Logwood v. Robertson*, 62 Ala. 523; *Warren v. Fenn*, 28 Barb. 333.

⁸ *Thompson v. Dawson*, 3 Head, 384; *Reilly v. Miami Exporting Co.*, 5 Ohio, 333; *Henson v. Westcott*, 82 Ill. 224; *Burns v. Taylor*, 23 Ala. 255; *Atkinson v. Lindsey*, 39 Ind. 296.

⁹ *Little v. Brown*, 2 Leigh, 353; *Hall v. Scovell*, 10 Nat. Bank Reg. 295.

§ 1255. **Tenants in common.**—The party to whom an amount of money is allowed as owelty in partition, has an equitable lien in the nature of a vendor's lien. "That the sum awarded in partition for inequality between the smaller and larger divisions is a lien upon the larger division, we are well satisfied. The final decree operates as a conveyance, and transfers in severalty what was held in common. If the division is unequal in value, this inequality is compensated by the allotment of a sum of money sufficient to equalize the respective divisions. In other words, where one party gets more of the land than his cotenant, he is required to pay for the excess, because the land to that extent which has been allotted to him, is in fact and in the eye of the law the land of his cotenant. It forms the consideration for which the payment is to be made, and in getting the land of another for a money consideration, it must be that he is to be considered a purchaser."¹ Where one tenant in common sells to another tenant in common an undivided interest in the lands held by them, a lien on the interest sold, for the unpaid purchase money, arises in favor of the vendor.² One partner selling land to another partner is entitled to a vendor's lien.³

§ 1256. **Uncertain claim.**—The vendor cannot claim a lien as security for an uncertain demand. A having agreed to sell to B the undivided half of a tract of land at a specified price, and B at the same time having agreed to render his personal services in the management and sale of the land, A executed a deed to B in compliance with the contract, taking back a mortgage as security for its performance. B failed to perform his part of the contract, and A claimed an equitable lien upon the land for the value of the services which were not performed as required by the contract, and also for the amount of a

¹ *Baltimore & Ohio R. R. Co. v. Trimble*, 51 Md. 99, 107.

² *Norman v. Harrington*, 62 Ala. 107.

³ *Reese v. Kinkead*, 18 Nev. 126. This lien is valid at least as against all but partnership creditors: *Reese v. Kinkead*, 18 Nev. 126.

deduction which had been made from the real value of the interest sold to B, as a special inducement to enter into the contract. The court held that while A might be able to maintain a remedy at law for damages caused by B's failure to comply with his contract, such damages were too uncertain in their character to form the subject of a vendor's lien.¹ "The rule which appears to be settled by the authorities is, that in order to create such a lien, there must be a debt for unpaid purchase money to a fixed amount due directly to the vendor. If the obligation consist of a collateral covenant, or be for the discharge of a liability to a third party, no lien is retained when the conveyance is absolute; and where the obligation of the vendee to discharge such liability appears to be substituted for the purchase money, the lien is lost, for the obligation of the purchaser is taken instead of the purchase money, or a direct security for it."² An obligation to support the grantor for life cannot be made the subject of a vendor's implied lien.³ A woman conveyed by deed the west half of a quarter section of land to her brother, who executed back a lease of it to her, and agreed to build for her a house on the east half, she agreeing to permit him and his wife to occupy a portion of it during their natural lives, and also to lease to him the whole quarter section for the term of her own natural life for a certain share of the crops. These conditions, the court decided,

¹ *Payne v. Avery*, 21 Mich. 524.

² *Patterson v. Edwards*, 29 Miss. 67, 71, per Mr. Justice Handy. And see *Vandoren v. Todd*, 2 Green Ch. 397; *Chapman v. Beardsley*, 31 Conn. 115; *Hiscock v. Norton*, 42 Mich. 320; *Sears v. Smith*, 2 Mich. 243.

³ *Arlin v. Brown*, 44 N. H. 102; *Chase v. Peck*, 21 N. Y. 581; *McKillip v. McKillip*, 8 Barb. 552; *Brawley v. Cawtron*, 8 Leigh, 522; *Gard v. Gard*, 108 Cal. 19. See, also, *Camp v. Gifford*, 67 Barb. 434; *Peters v. Tunnell*, 43 Minn. 473; 19 Am. St. Rep. 252; *Meigs v. Dimmock*, 6 Conn. 458. A lien, it is held in some cases, is not created by an agreement to assume a debt or collateral obligation of the vendor: *Patterson v. Edwards*, 29 Miss. 67; *Chapman v. Beardsley*, 31 Conn. 115; *Long v. Burke*, 2 Bush (Ky.), 90; *Parrot v. Sweetland*, 3 Myl. & K. 655; *Lea v. Fabbri*, 45 N. Y. Supr. Ct. 361. In other cases it is held that the lien does exist: *Woodall v. Kelly*, 85 Ala. 368; 7 Am. St. Rep. 57; *Williams v. Crow*, 84 Mo. 298; *Elliott v. Plattor*, 43 Ohio St. 198.

should be construed together, and being too indefinite to be estimated at a fixed sum, a lien on the land for their enforcement could not exist.¹

§ 1256 a. **When purchase price may be paid in money or other mode.**—Where the purchase price is to be paid in money, though there may be a stipulation that it may be discharged in something else, a vendor's lien may be enforced for the amount remaining unpaid when there has been a failure to discharge the indebtedness at the time agreed on.² If, in addition to the payment of a specified sum of money, the purchaser agrees to fence the land purchased, and to construct stock gaps at places where the outer fences are crossed, and to provide road crossings at convenient places, the purchaser's failure to perform these acts will not create or sustain a vendor's lien for the amount of damages that may be caused by such failure. The remedies of the vendor are an action at law to recover damages, or a suit in equity to enjoin the use of the land until compliance with the terms of the purchase.³

§ 1257. **Extent of lien.**—The lien extends to interest accruing on the purchase price,⁴ and the widow's right

¹ *Hiscock v. Norton*, 42 Mich. 320. Said Graves, J., in delivering the opinion of the court: "The general doctrine relative to what is understood as the vendor's lien upon realty rests on the postulate that it is not equitable for one to absorb another's wealth without recompense; and, therefore, as between grantor and grantee, the court will intend that the purchased estate was to be held for the unpaid purchase money, unless circumstances are found which repel the presumption. And among the circumstances which will have this effect are reckoned, *first*, the formation of arrangements between the parties, which suffice to make out that reliance was not placed on any unwritten claim against the land; and *second*, the introduction of such schemes by the parties, and their blending of bargainings in such way as to disable the court from ascertaining and defining with any certainty the present amount in money, or from identifying the charge sought to be enforced." And see *Jordan v. Wimer*, 45 Iowa, 65; *Dubois v. Hull*, 43 Barb. 26; *McDole v. Purdy*, 23 Iowa, 277.

² *Parrish v. Hastings*, 102 Ala. 414; 48 Am. St. Rep. 50.

³ *Parrish v. Hastings*, 102 Ala. 414; 48 Am. St. Rep. 50.

⁴ *Succession of Richardson*, 10 La. Ann. 616. The lien will attach to a

to dower may be subject to it.¹ It extends also to judicial sales.² A note, the consideration for which is in part unpaid purchase money, will be secured by the lien for that part, when the amount can be determined.³ The lien may affect the separate real estate of a married woman.⁴ Where land is sold for the consideration of a quantity of cotton to be delivered in the future, the vendor has no lien on the land. The breach of the contract does not create a debt, but is an injury, the remedy for which is damages.⁵

§ 1257 a. Other interests in land to which lien will attach.—The lien will attach to an equitable interest in land.⁶ The lien will also attach to a pre-emption claim

leasehold interest: *Bratt v. Bratt*, 21 Md. 578; *Richardson v. Bowman*, 40 Miss. 782; *Choate v. Tighe*, 10 Heisk. (Tenn.) 621; *Turkes v. Reis*, 14 Abb. N. Cas. 26; *Cole v. Smith*, 24 W. Va. 287. But see *contra*: *Cade v. Brownlee*, 15 Ind. 369; 77 Am. Dec. 95.

¹ *Fisher v. Johnson*, 5 Ind. 492; *Boyd v. Martin*, 9 Heisk. 382; *Nutter v. Fouch*, 86 Ind. 451; *Noyes v. Kramer*, 54 Iowa, 22; *Martin v. Smith*, 25 W. Va. 579.

² *Buford v. McCormick*, 57 Ala. 428; *Mims v. Macon & W. R. R. Co.*, 3 Ga. 333.

³ *Russell v. McCormick*, 45 Ala. 587; 6 Am. Rep. 707; *Swain v. Cato*, 34 Tex. 395. See, also, *Sutton v. Sutton*, 39 Tex. 549; *Hicks v. Morris*, 57 Tex. 658; *Peters v. Tunnell*, 43 Minn. 473; 19 Am. St. Rep. 252; *Strong-fellow v. Ivie*, 73 Ala. 209; *McCandlish v. Keen*, 13 Gratt. (Va.) 615; *Wilkinson v. Parmer*, 82 Ala. 367; *Russell v. McCormick*, 45 Ala. 587; 6 Am. Rep. 707. See *Harris v. Hanks*, 25 Ark. 510. But see *contra*: *Clark v. Curtis*, 11 Leigh (Va.), 585; *Cole v. Smith*, 24 W. Va. 287.

⁴ *Kent v. Gerhard*, 12 R. I. 92; 34 Am. Rep. 612; *Weinberg v. Rempe*, 15 W. Va. 829; *Jackson v. Rutledge*, 3 Lea (Tenn.), 626; 31 Am. Rep. 655; *Chilton v. Braiden*, 2 Black, 458; *Morrison v. Brown*, 83 Ill. 562; *Jackson v. Rutledge*, 3 Lea (Tenn.), 626; 31 Am. Rep. 655.

⁵ *Harris v. Hanie*, 37 Ark. 348.

⁶ *Ortman v. Plummer*, 52 Mich. 76; *Russell v. Watts*, 41 Mich. 602; 93 Am. Dec. 270; *Johns v. Sewell*, 33 Ind. 1; *Bledsoe v. Games*, 30 Mo. 448; *Poe v. Paxton*, 26 W. Va. 607; *Fleece v. O'Rear*, 83 Ind. 200; *Barrett v. Lewis*, 106 Ind. 120; *Jones v. Parker*, 51 Wis. 218; *Loomis v. Davenport etc. R. Co.*, 3 McCrary (U. S.), 489; *Dwenger v. Brannigan*, 95 Ind. 221; *Iglehart v. Armiger*, 1 Bland. (Md.) 526; *Logwood v. Robertson*, 62 Ala. 523; *Carey v. Boyle*, 53 Wis. 574; *Warren v. Fenn*, 28 Barb. 333; *Ligon v. Alexander*, 7 J. J. Marsh. (Ky.) 288. But see to contrary effect: *Strider v. King*, 3 Cranch (C. C.), 67.

upon public lands.¹ It cannot, however, be enforced against the proceeds arising from a sale of the interest.² It extends to a right of way over the land of the vendor.³ The lien is lost as to anything which, by severance from the real estate, has become personal property.⁴ The lien may be enforced by mortgagees.⁵ One to whom money has been allowed in partition may have a lien.⁶ Guardians may enforce the lien.⁷ The lien may be enforced by the vendor or his personal representatives.⁸ A vendor's lien is a chose in action.⁹ Where the owner of land makes a parol gift of it to his daughter, and she sells the land to another, taking his notes for the purchase price, and the grantor executes a deed to the vendee, the daughter, on nonpayment of the notes, is entitled to enforce a lien.¹⁰ A third person to whom the purchase money is payable has a lien.¹¹ The lien will not be enforced against rents and profits.¹²

§ 1258. **Assignment of lien.**—The general rule is that the vendor's implied lien is not assignable.¹³ But in some

¹ *Pierson v. David*, 1 Iowa, 23.

² *Mims v. Lockett*, 23 Ga. 237; 68 Am. Dec. 521.

³ *Hempfield R. Co. v. Thornburg*, 1 W. Va. 261.

⁴ *Manning v. Frazier*, 96 Ill. 279.

⁵ *Barrett v. Lewis*, 106 Ind. 120.

⁶ *Baltimore etc. R. Co. v. Trimble*, 51 Md. 99.

⁷ *Ferguson v. Shepherd*, 58 Miss. 804.

⁸ *Evans v. Enloe*, 70 Wis. 345; *Robinson v. Appleton*, 22 Ill. App. 351; 124 Ill. 276; *Wright v. Heffner*, 57 Tex. 518; *Keith v. Horner*, 32 Ill. 534; *Leeper v. Lyon*, 68 Mo. 216.

⁹ *Evans v. Enloe*, 70 Wis. 345.

¹⁰ *Russell v. Watt*, 41 Miss. 602; 93 Am. Dec. 270. See, also, *Holloway v. Ellis*, 25 Miss. 103; *Stewart v. Hutton*, 3 J. J. Marsh. 178; *Ligon v. Alexander*, 7 J. J. Marsh. 289.

¹¹ *Whetsel v. Roberts*, 31 Ohio St. 503; *Latham v. Staples*, 46 Ala. 462; *Johnson v. Townsend*, 77 Tex. 639; *Francis v. Wells*, 2 Colo. 660; *Nichols v. Glover*, 41 Ind. 24; *Young v. Hawkins*, 74 Ala. 370; *Tysen v. Wabash R. Co.*, 15 Fed. Rep. 763; *Carver v. Eads*, 65 Ala. 190; *Woodall v. Kelly*, 85 Ala. 368; 7 Am. St. Rep. 57; *Louisiana Nat. Bank v. Knapp*, 61 Miss. 485; *Mitchell v. Butt*, 45 Ga. 162; *Mize v. Barnes*, 78 Ky. 506; *De Lisle v. Moss*, 34 La. Ann. 164.

¹² *Wilson v. Ewing*, 79 Ky. 549; *Little v. Brown*, 2 Leigh (Va.), 253; *Collins v. Richart*, 14 Bush (Ky.), 621; *Wooten v. Bellinger*, 17 Fla. 289.

¹³ *Brush v. Kinsley*, 14 Ohio, 20; *Tiernan v. Beam*, 2 Ohio, 383; 15 Am.

States an assignment of the lien is permitted.¹ "An equitable lien is an encumbrance upon land, which can only be held by a vendor; and although assets may be marshaled, so as to put a vendor altogether upon his equitable lien, for the benefit of other creditors, yet no third person can, as assignee of the vendor, derive any benefit

Dec. 557; *Jackman v. Hallock*, 1 Ohio, 318; 13 Am. Dec. 627; *Horton v. Horner*, 14 Ohio, 437; *Cowan v. Sharpe*, 11 Heisk. 450; *Tharpe v. Dunlap*, 4 Heisk. 674; *McWhirter v. Swaffer*, 6 Baxt. 342; *Green v. Demoss*, 10 Humph. 371; *Pillow v. Helm*, 7 Baxt. 545; *Bowlin v. Pearson*, 4 Baxt. 341; *Carlton v. Buckner*, 28 Ark. 66; *Ross v. Heintzen*, 36 Cal. 313; *Baum v. Grigsby*, 21 Cal. 172; 81 Am. Dec. 153; *Hecht v. Spears*, 27 Ark. 229; 11 Am. Rep. 784; *Kimble v. Esworthy*, 6 Bradw. 517; *Williams v. Christian*, 23 Ark. 255; *Lewis v. Covillaud*, 21 Cal. 178; *Williams v. Young*, 21 Cal. 227; *Welborn v. Williams*, 9 Ga. 86; 52 Am. Dec. 427; *Jones v. Doss*, 27 Ark. 518; *Rogers v. James*, 33 Ark. 77; *Shall v. Biscoe*, 18 Ark. 142; *Hutton v. Moore*, 26 Ark. 382; *Elder v. Jones*, 85 Ill. 384; *Webb v. Robinson*, 14 Ga. 216; *Iglehart v. Armiger*, 1 Bland. 519; *Dixon v. Dixon*, 1 Md. Ch. 220; *Keith v. Horner*, 32 Ill. 524; *Dayhuff v. Dayhuff*, 81 Ill. 499; *Stagg v. Small*, 4 Bradw. 192; *Carpenter v. Mitchell*, 54 Ill. 126; *Moshier v. Meek*, 80 Ill. 79; *Richards v. Leaming*, 27 Ill. 431; 81 Am. Dec. 239; *White v. Williams*, 1 Paige, 502; *Pitts v. Parker*, 44 Miss. 247; *Walker v. Williams*, 30 Miss. 165; *Lindsey v. Bates*, 42 Miss. 397; *Skaggs v. Nelson*, 25 Miss. 88; *Stratton v. Gold*, 40 Miss. 778; *Briggs v. Hill*, 6 How. 362; 38 Am. Dec. 441; *McLaurie v. Thomas*, 39 Ill. 291; *Wing v. Goodman*, 75 Ill. 159; *Avery v. Clark*, 87 Cal. 619; 22 Am. St. Rep. 272; *Gruhn v. Richardson*, 128 Ill. 178; *First Nat. Bank v. Salem Capital Flour Mills*, 39 Fed. Rep. 89.

¹ *Cordova v. Hood*, 17 Wall. 1; *Moore v. Raymond*, 15 Tex. 554; *White v. Downs*, 40 Tex. 225; *Kern v. Hazlerigg*, 11 Ind. 443; 71 Am. Dec. 360; *Honore v. Bakewell*, 6 Mon. B. 67; 43 Am. Dec. 147; *Wells v. Morrow*, 38 Ala. 125; *Buford v. McCormick*, 57 Ala. 428; *Green v. Casey*, 70 Ala. 417; *Nichols v. Glover*, 41 Ind. 24; *Johnston v. Gwathmey*, 4 Litt. 317; 14 Am. Dec. 135; *Eubank v. Poston*, 5 Mon. 285; *White v. Stover*, 10 Ala. 441; *Lang v. Wilkinson*, 57 Ala. 259; *Roper v. McCook*, 7 Ala. 318; *Ripperdon v. Cozine*, 8 Mon. B. 465; *Broadwell v. King*, 3 Mon. B. 449; *Wiseman v. Hutchinson*, 20 Ind. 40; *Fisher v. Johnson*, 5 Ind. 492. And see *Hightower v. Rigsby*, 56 Ala. 126; *Bankhead v. Owen*, 60 Ala. 457; *Thomas v. Wyatt*, 5 Mon. B. 132; *Andrews v. Hobgood*, 1 Lea (Tenn.), 693; *Griggsby v. Hair*, 25 Ala. 327; *Robertson v. Guerin*, 50 Tex. 317; *Planters' Bank v. Dodson*, 17 Miss. (9 Smedes & M.) 527; *Peet v. Beers*, 4 Ind. 46; *Lusk v. Hopper*, 3 Bush, 179. As to the rule in Mississippi, see Code, 1880, § 1124, and *Louisiana Bank v. Knapp*, 61 Miss. 485. A husband who has sold land, and who has the note for the unpaid purchase price made to his wife as a gift, thereby assigns to her the lien: *Wilkinson v. May*, 69 Ala. 33; *Otis v. Gregory*, 111 Ind. 504; *Bates v. Childers*, 4 N. Mex. 347.

from such lien; nor can it, like a bond or mortgage, be assigned, because it is not expressed in writing, or in any separate contract; but exists only as an inseparable, equitable incident of the contract of purchase, and is raised by construction of equity, in favor of the vendor only. To allow it to pass by an assignment of the claim for the purchase money, or by a transfer of the bonds or notes given as security for the payment of the purchase money, would be of the most ruinous consequences to titles to real estates."¹ An assignment, under the general rule, even by express contract, is ineffectual.² But the lien may revive, if the note is subsequently acquired by the original vendor.³ If a judgment for the purchase money be assigned, the lien does not thereby pass.⁴

§ 1259. **Beneficial owner.**—A lien may be enforced in favor of one who is beneficially the owner of the land, although not the grantor in the deed. Thus, a father made a parol gift of land to his daughter, and she subsequently sold the land, taking the purchaser's notes for the purchase money, and the father executed a deed to the purchaser. The court decided that although the daughter was not the grantor, she was the vendor, and that she could claim a lien for the unpaid purchase money.⁵

¹ *Iglehart v. Armiger*, 1 Bland, 519, 524.

² *McLaurie v. Thomas*, 39 Ill. 291; *Keith v. Horner*, 32 Ill. 524.

³ *Rogers v. James*, 33 Ark. 77; *Cotten v. McGehee*, 54 Miss. 510; *Bancroft v. Cosby*, 74 Cal. 583. See *Bernays v. Field*, 29 Ark. 218; *Kelly v. Payne*, 18 Ala. 371; *Lindsey v. Bates*, 42 Miss. 397; *White v. Williams*, 1 Paige, 502; *Hallock v. Smith*, 3 Barb. 267.

⁴ *Turner v. Horner*, 29 Ark. 440.

⁵ *Russell v. Watt*, 41 Miss. 602; 93 Am. Rep. 270. Where a purchaser died intestate, leaving minor children, no administration, however, being had on his estate, and an action was brought by the vendor against the widow and the children, the latter being represented by their guardian *ad litem*, in which action the vendor obtained a decree enforcing a vendor's lien upon the land, in pursuance of which the land was afterward sold to the vendor, the court held that so far as the title of the children by succession was affected by the decree, the decree was valid; and further, that the children could not, after attaining majority, maintain ejectment for the land: *Meroux v. Weber*, 53 Cal. 130.

§ 1260. **Transfer of note as collateral security.**—An exception to the general rule that a vendor's lien is not assignable is said to exist in cases where the assignment is made as collateral security for the vendor's indebtedness. In such cases, the assignee who holds the lien for the assignor's benefit as well as his own is subrogated to the equities of the assignor.¹

§ 1261. **Excess at execution sale.**—Where land is sold on execution, and the sum bid is in excess of the amount necessary to satisfy the judgment, for the payment of which surplus credit is given to the purchaser by consent of the defendant in execution, a vendor's lien will exist to secure its payment.² The case cited in support of this statement is somewhat peculiar. The court said it was unable to find any case in point, and the author knows of none. But the reasoning of the court seems sound: "If, then, in this case, the plaintiff and sheriff, at his request, made through his agent, extended time to defendant for so much of his bid as plaintiff rightfully controlled, it is not perceived that the transaction is not in substance *pro tanto* a sale of the land consummated through the powers of a sheriff's deed. The substantial principle upon which the vendor's lien is said to rest, 'that a person who has gotten the estate of another ought not in conscience, as between them, to be allowed to keep it, and not pay the full consideration money,' seems applicable to the case. The facts of the case seem to us to be such as entitled the plaintiff in equity to the lien. By his consent only was it that defendant was enabled to receive a deed without paying in full in cash. The deed to that extent may be regarded as the act of the plaintiff. So regarding it, the law would uphold the lien, unless it is waived either expressly or by acts showing such intention."³

¹ *Crawley v. Riggs*, 24 Ark. 563; *Carleton v. Buckner*, 28 Ark. 66; *Hallock v. Smith*, 3 Barb. 267; *Plowman v. Riddle*, 14 Ala. 169; 48 Am. Dec. 92. See *Chapman v. Liggett*, 41 Ark. 292.

² *Yarborough v. Wood*, 42 Tex. 91; 19 Am. Rep. 44.

³ *Yarborough v. Wood*, 42 Tex. 91, 19 Am. Rep. 44, per Gould, J. A

§ 1262. **Waiver of lien.**—If the grantor takes a mortgage or other independent security for the payment of the purchase money, he waives the lien.¹ If a mortgage is taken, the fact that the security is inadequate, or that the mortgage is defective, does not revive the lien.² And the lien is waived, notwithstanding the security taken is void.³ The security, however, should be such as shows an intention to waive the lien.⁴ If the vendor accept a

purchaser in possession at the time land is sold under a decree enforcing a vendor's lien is not entitled to the crops growing on the land at the time of the sale: *Johnston v. Smith*, 70 Ala. 108. But see *Orans v. Hamilton County Commissioners*, 87 Ind. 162.

¹ *Orrick v. Durham*, 79 Mo. 174; *Dibblee v. Mitchell*, 15 Ind. 435; 77 Am. Dec. 99; *Lewis v. Covillaud*, 21 Cal. 178; *McLaurie v. Thomas*, 39 Ill. 291; *Briscoe v. Callahan*, 77 Mo. 134; *Denny v. Steakly*, 2 Heisk. 156; *McDonough v. Cross*, 40 Tex. 251; *Johnson v. Godden*, 33 Ark. 600; *Dudley v. Dickson*, 14 N. J. Eq. 252; *Mayham v. Coombs*, 14 Ohio, 428; *McGonigal v. Plummer*, 30 Md. 422; *Vail v. Foster*, 4 N. Y. 312; *Sharp v. Collins*, 74 Mo. 266; *Wilson v. Sawyer*, 74 Ill. 473; *Stuart v. Harrison*, 52 Iowa, 511; *Richards v. McPherson*, 74 Ind. 158; *Richardson v. Ridgely*, 8 Gill & J. 87; *Follett v. Reese*, 20 Ohio, 546; 55 Am. Dec. 472; *Hawkins v. Thurman*, 1 Idaho, N. S., 598; *Vandoren v. Todd*, 2 Green Ch. 397; *Brown v. Christie*, 35 Tex. 689; *Fonda v. Jones*, 42 Miss. 792; 2 Am. Rep. 669; *Adams v. Buchanan*, 49 Mo. 64; *Masters v. Templeton*, 92 Ind. 447; *Carico v. Farmers & Merchants' Bank*, 33 Md. 235; *Durette v. Briggs*, 47 Mo. 356; *Fish v. Howland*, 1 Paige, 20; *Richards v. Leaming*, 27 Ill. 431; 81 Am. Dec. 239; *Kimble v. Esworthy*, 6 Bradw. (Ill.) 517; *Warner v. Scott*, 63 Ill. 368; *Griffin v. Blanchar*, 17 Cal. 70; *Gnash v. George*, 58 Iowa, 492; *Brinkerhoff v. Vansciven*, 3 Green Ch. 251; *Neal v. Speigle*, 33 Ark. 63; *Parker County v. Sewell*, 24 Tex. 238; *Anderson v. Griffith*, 66 Mo. 44; *Kirkham v. Boston*, 67 Ill. 599; *Nairin v. Prowse*, 6 Ves. 752; *Walker v. Struve*, 70 Ala. 167; *Emison v. Whittlesey*, 55 Mo. 254; *Gilman v. Brown*, 1 Mason, 207; *Baum v. Grigsby*, 21 Cal. 172; 81 Am. Dec. 153; *Camden v. Vail*, 23 Cal. 633.

² *Partridge v. Logan*, 3 Mo. App. 509; *Hunt v. Waterman*, 12 Cal. 301.

³ *Camden v. Vail*, 23 Cal. 633. See *Himes v. Langley*, 85 Ind. 77; *Boyer v. Austin*, 75 Mo. 81.

⁴ *Dubois v. Hull*, 43 Barb. 26; *Corlies v. Howland*, 26 N. J. Eq. 311; *Emison v. Whittlesey*, 55 Mo. 254; *Lawrence v. Meyer*, 35 Ark. 104; *De Forest v. Holum*, 38 Wis. 516; *Thames v. Caldwell*, 60 Ala. 644; *Sanders v. McAfee*, 41 Ga. 684. See *Lavender v. Abbott*, 30 Ark. 172; *Fonda v. Jones*, 42 Miss. 792; 2 Am. Rep. 669; *Cordova v. Hood*, 17 Wall. 1; *Dibblee v. Mitchell*, 15 Ind. 435; 77 Am. Dec. 99; *Thomason v. Cooper*, 57 Ala. 560; *Christian v. Austin*, 36 Tex. 540; *Ellis v. Singletary*, 45 Tex. 27; *Faver v. Robinson*, 46 Tex. 204; *Willis v. Gay*, 48 Tex. 463; 26 Am. Rep. 328. See *Remington v. Higgins*, 54 Cal. 629.

deed of other land in part payment of the consideration, he waives his lien, notwithstanding the title to the land conveyed to him may be imperfect or invalid.¹ If the deed so taken contains a covenant of warranty, the vendor's remedy is on the covenant.² Where land and personal property are sold for a gross sum, it being impossible to determine the proportion paid for the land, it is fair to presume that the vendor did not look to the land alone, and had waived his lien.³ The lien is not waived by an agreement in a deed made by the grantor to his daughter that he should reside on the land during his lifetime.⁴

§ 1263. **Taking a note.**—It is presumed that the vendor intends to preserve his lien, and, if he takes a note, or the personal obligation of the vendor alone, this is but taking an evidence of the indebtedness. By taking the personal note of the vendee, the vendor does not waive the lien.⁵ But where notes payable at different times have been taken for the purchase money, and the grantee has contracted to sell the land, the grantor, in advance of

¹ Willard v. Reas, 26 Wis. 540. See Hare v. Van Deusen, 32 Barb. 92. But see Bishop v. Snell, 37 Ala. 90.

² Willard v. Reas, 26 Wis. 540.

³ Stringfellow v. Ivie, 73 Ala. 209.

⁴ Webster v. McCullough, 61 Iowa, 496.

⁵ Conlee v. Conlee, 87 Ind. 249; Taylor v. Hunter, 5 Humph. 569; Plowman v. Riddle, 14 Ala. 109; 48 Am. Dec. 92; Manly v. Slason, 21 Vt. 271; 52 Am. Dec. 60; Andrews v. Scotten, 2 Bland. 629; Evans v. Goodlet, 1 Blackf. 246; Bradford v. Harper, 25 Ala. 337; White v. Williams, 1 Paige, 502; Thornton v. Knox, 6 Mon. B. 74; Garson v. Green, 1 Johns. Ch. 308; Clark v. Hunt, 3 Marsh. J. J. 553; Baum v. Grigsby, 21 Cal. 172; 81 Am. Dec. 153; Denny v. Steakly, 2 Heisk. 156; Corlies v. Howland, 26 N. J. Eq. 311; Honore v. Blakewell, 6 Mon. B. 67; 43 Am. Dec. 147; Pinchain v. Collard, 13 Tex. 333; Christian v. Austin, 36 Tex. 540; Warren v. Fenn, 28 Barb. 333; Aldridge v. Dunn, 7 Blackf. 249; 41 Am. Dec. 224; Mackreth v. Symmons, 15 Ves. 329; Brinkerhoff v. Vansciven, 3 Green Ch. 251; Cummings v. Moore, 61 Miss. 184; Walker v. Sedgwick, 8 Cal. 398; Truebody v. Jacobson, 2 Cal. 269; Chapman v. Chunn, 5 Ala. 397; Cox v. Fenwick, 3 Bibb, 183; Henley v. Stemmons, 4 Mon. B. 131; Lagow v. Badollett, 1 Blackf. 416; 12 Am. Dec. 258; Walker v. Sedgwick, 8 Cal. 398. See Tedder v. Steele, 70 Ala. 347; Parker v. McBee, 61 Miss. 134.

the maturity of the notes, cannot obtain a decree that the grantee shall not sell the land without informing the purchaser that the grantor has a lien upon it.¹ Where the consideration recited in the deed was: "For and in consideration of five thousand dollars in the stock of said company, and the further sum of two thousand five hundred dollars in bonds of the said company, by the party of the second part to the party of the first part, in hand paid, the receipt whereof is hereby acknowledged," it was held that no lien was reserved.²

¹ *Taylor v. Hunter*, 5 Humph. 569. Said Reese, J., in delivering the opinion of the court: "The nature of the lien existing between vendor and vendee cannot be, and ought not to be, changed in nature or extent by judicial declaration and injunction in chancery, uncoupled with a sale of the premises for the satisfaction of the lien. The order that the complainant has obtained from the chancellor upon the defendants, that they shall not sell the land without telling the purchaser that the complainant's lien exists, is unsustained, we imagine, by principle or precedent. Suppose he does sell without such announcement, does Searcy become debtor to the complainant instead of the land? Or shall he be merely proceeded against as for a contempt? The effort is to create a new species of judicial mortgage. This cannot be done. It is incident to the nature of this lien that the vendor may lose it by a fair sale and conveyance on the part of the vendee, to a third person having no notice of its existence. It is the vendee's [vendor's] business, if he apprehends such a contingency, to withhold the title, or take a mortgage or personal security, or make the existence of his right notorious. But to attain his purpose in the manner attempted in this bill would be to change the nature and extent of the right." The fact that the note was executed at the grantor's direction to a third person will not destroy the lien: *Joiner v. Perkins*, 59 Tex. 300.

* *Keith v. Wolf*, 5 Bush, 646. Said the court, per Robertson, J.: "To give a constructive lien, the statute contemplates and requires such a recital as will clearly notify creditors and subsequent purchasers that the consideration, or a portion of it, and *exactly what portion*, remains unpaid. The recital in this case does not show that any portion of the consideration, nor if any, precisely how much, was unpaid. The stock, being an investment and a vendible commodity, was indisputably a payment of five thousand dollars; and why should not the company's printed bonds, payable in ten years, with interest coupons attached, be equally considered an investment and a vendible commodity. Why are they not as much so as the five-twenty bonds of the United States? The only difference between them is, that one is issued by a political and the other by a civil corporation, and they are all used for the same current purposes. Surely the recital as to these company bonds could not give certain notice that they had not been, like the stock, accepted as pay-

§ 1264. **Taking a check.**—If the vendee gives a check upon a bank for the amount of a cash payment, but withdraws before the presentation of the check the funds which he had on deposit, so that the check is not paid, the vendor does not lose his lien. Such act of the vendee is a fraud upon the vendor.¹ So the lien is not waived if the check taken by the vendor is by consent of the parties returned to the drawer, and a note taken. The check is not payment. "It was no more a payment than the execution or renewal of a bond or note or bill of exchange for the consideration, which is accepted, but not paid, which was formerly regarded as a payment, or rather, as a surrender of the lien, but which, by later and more enlightened decisions, has been determined otherwise. The lien is a lien to secure the *payment* of the consideration, and *prima facie* it continues until payment is made, or it is waived or abandoned by some overt act on the part of the claimant, indicating an intention to do so, as taking and looking to other security for the payment, or until it has been lost by the transfer of the land to an innocent purchaser, for a valuable consideration without notice, or the means of notice. The bond, note, bill of exchange, or check is but the evidence of the amount due, and the means by which payment may be obtained or coerced, and may be changed or renewed from time to time, without actual payment. And from such change or

ment. On the contrary, both their character and the letter of the recital import payment, and, if needful, this construction is fortified by the intrinsic incredibility that the company in such a contract would guaranty its bonds by an extraordinary encumbrance, which might embarrass its road and disturb public convenience." See *Dixon v. Gayfere*, 17 Beav. 421; *Earl of Jersey v. Britton Ferry Floating Dock Co.*, Law R. 7 Eq. 409; *Clarke v. Royle*, 3 Sim. 499; *Buckland v. Pocknell*, 13 Sim. 406; *Long v. Burke*, 2 Bush, 90; *Ledford v. Smith*, 6 Bush, 129; *Phillips v. Skinner*, 6 Bush, 662. A judgment on the note preserves the lien: *Beck v. Tarrant*, 61 Tex. 402; *Slaughter v. Owens*, 60 Tex. 668.

¹ *Madden v. Barnes*, 45 Wis. 135; 30 Am. Rep. 703. In this case the funds of the vendee were withdrawn two weeks, and the check presented nearly four weeks after its date. See, also, *O'Connor v. Smith*, 40 Ohio St. 214. And see *Arnholt v. Hartwig*, 73 Mo. 485. Taking a certificate of deposit does not waive the lien: *Mims v. Macon etc. R. Co.*, 3 Ga. 333.

renewal, the presumption cannot rationally be indulged that the vendor intended to surrender his lien, more than that he intended to surrender his debt. By any fair interpretation of the transaction, it must be understood that the parties intended by the surrender and cancelment of the check, and the execution of a note for the amount, *antedating* the same to the date of the check, that their rights should stand as if the check had not been given. What had been done was undone before payment in fact had been consummated on the check. It would be a strange and unnatural interpretation of the acts of the parties to construe the surrender and cancelment of the check as an intended loan of money, rather than an intention to undo what had been done.”¹

§ 1265. **Payment at a future day.**—The circumstance that the money is to be paid at a future day does not deprive the vendor of his lien. Thus, where for the part of the purchase money unpaid the vendee had given a bond to be paid within twelve months after the vendor's death, the vendor was allowed his lien.² So the lien may exist where a part of the purchase money remains unpaid, and its payment, by the agreement of the parties, is made dependent on the contingency of the wife of the vendor surviving him, and asserting her title to dower. In case she

¹ *Honore's Executors v. Bakewell*, 6 Mon. B. 67, 72; 43 Am. Dec. 147. In *Mims v. Macon & Western R. R. Co.*, 3 Ga. (Kelly) 333, it is held that the acceptance of a certificate of deposit, if the money is not paid when called for, is not a waiver of the lien. But it is a matter of defense to a bill to enforce a vendor's lien, that the maker of a promissory note, for the price of land, payable at a bank, had funds at the bank, and suffered loss through nonpresentation of the note: *Sims v. Commercial Bank*, 73 Ala. 248.

² *Winter v. Lord Anson*, 3 Russ. 488. “I do not think,” said the Lord Chancellor, “that the lien is affected by the fact of the period of payment being dependent on the life of the vendor. That circumstance does not appear to me to afford such clear and convincing evidence of the intention of the vendor to rely, not upon the security of the estate, but solely upon the personal credit of the vendee, as would be necessary in order to get rid of the lien. It would not be inconsistent with an express pledge, and I do not perceive why it is at variance with the lien resulting from the rules of a court of equity.”

dies before her husband, his right to the part of the money withheld to meet her claim in the event of her survival accrues, and he may enforce his lien.¹

§ 1266. **Independent security.**—But while the taking of the note of the grantee is not of itself a waiver of the lien, still if the vendor take independent security of any kind, he loses his lien. If he takes as security for the purchase money a bill of exchange drawn by the grantee upon a third person, and the latter accepts it, the bill of exchange becomes an independent security, the taking of which destroys the vendor's lien. The acceptor of the bill becomes the principal debtor, and is primarily liable to the vendor.² The taking of personal collateral security is a waiver of the lien.³ It is immaterial whether the relation of the surety to the note taken by the vendor is that of indorser, joint maker, or guarantor. The lien is waived by the acceptance of the independent security.⁴ But in Kentucky, it is held that the substitution of a note

¹ Redford v. Gibson, 12 Leigh, 332, 348.

² Boynton v. Champlin, 42 Ill. 57.

³ Williams v. Roberts, 5 Ohio, 35; Brown v. Gillman, 1 Mason, 214; S. C. 4 Wheat. 255; Stevens v. Rainwater, 4 Mo. App. 292; Ilett v. Collins, 103 Ill. 74; Kendrick v. Eggleston, 56 Iowa, 128; 41 Am. Rep. 90; Akers v. Luse, 56 Iowa, 346; Cresap v. Manor, 63 Tex. 485. See, also, Walker v. Struve, 70 Ala. 167. Where the husband purchases the land, but the deed is made to his wife, the taking of his note is not a waiver of the lien: Davis v. Smith, 88 Ala. 596; Moore v. Worthy, 56 Ala. 163; Bakes v. Gilbert, 93 Ind. 70; Davenport v. Murray, 68 Mo. 198; Davis v. Pearson, 44 Miss. 508; Williams v. Crow, 84 Mo. 298. But see, *contra*, Andrus v. Coleman, 82 Ill. 26; 25 Am. Rep. 289.

⁴ Hummer v. Schott, 21 Md. 307; Yaryan v. Shriner, 26 Ind. 364. That the lien is waived by taking independent security, see Boon v. Murphy, 6 Blackf. 272; Carnes v. Hubbard, 10 Miss. (2 Smedes & M.) 108; Wilson v. Graham, 5 Munf. 297; Schwarz v. Stein, 29 Md. 112; Fonda v. Jones, 42 Miss. 792; 2 Am. Rep. 669; Campbell v. Henry, 45 Miss. 326; Cannon v. Bonner, 38 Tex. 487; Durette v. Briggs, 47 Mo. 356; Baum v. Grigsby, 21 Cal. 172; 83 Am. Dec. 153; Carrico v. Farmers & Merchants' Nat. Bank, 33 Md. 235; Sears v. Smith, 2 Mich. 243; McGonigal v. Plummer, 30 Md. 422; Dietrich v. Folk, 40 Ohio St. 635; Sanders v. McAfee, 41 Ga. 684; Vail v. Foster, 4 N. Y. 312; Johnson v. Sugg, 21 Miss. (13 Smedes & M.) 346; Manly v. Slason, 21 Vt. 271; 52 Am. Dec. 60. And see Porter v. The City of Dubuque, 20 Iowa, 440.

of a third person for that of the vendee will not cause a waiver of the lien.¹ The taking of a husband's note for the balance due to the vendor for land conveyed to his wife and partly paid for out of her funds, has been held to be a waiver of the lien.² "It is very true that when an individual parts with his land, he should receive the purchase money—that is sheer justice; and as long as he indicates by his act, for instance, the simply taking the bond or note of the purchaser, that he relies upon the land itself as a means of payment, the law says he shall retain a specific lien upon the property sold, subject, of course, to have it defeated by the intervention of creditors or purchasers without notice. But when he carves out an independent security for himself, in exchange for the land sold, when he creates for himself a distinct and separate fund to which he can look for payment, when he gives an absolute deed for the land, thereby rendering it subject to other claims and the contingency of sale, it does appear that the vendor has no right to complain. The evil, if any, is easily averted by ordinary care, either by taking a mortgage, which, on being recorded, is notice to all the world, thereby carrying out the policy of our registration laws, and in many cases preventing third persons from giving credits to the vendee, on the faith and security of the very land sold; or by retaining the title, simply giving a bond for a conveyance, upon the payment of the purchase money. These modes are familiar to everyone, and generally are pursued in those every-day transactions when real property is bought and sold. If the mode and manner of payment are all that are intended by the taking of a note with an indorser upon it, it would seem they would be sufficiently indicated without invoking the liability of a third person, who frequently would feel that

¹ *Tiernan v. Thurman*, 14 Mon. B. 277, 281. And see *McClure v. Harris*, 12 Mon. B. 261; *Burrus v. Roulhac*, 2 Bush, 39; *Jobe v. Chedister*, 5 Lea (Tenn.), 346; *Stroud v. Pace*, 35 Ark. 100; *Loomis v. Dav-
enport etc. R. Co.*, 17 Fed. Rep. 301.

² *Cowl v. Varnum*, 37 Ill. 181; *Andrus v. Coleman*, 82 Ill. 26; 25 Am. Rep. 289. But see *Bakes v. Gilbert*, 93 Ind. 70.

his contract was something more than mere form; and, certainly, the simple note or bond of the purchasers would be quite sufficient to set forth the amount, place, and time of payment."¹ Where a doubt remains, it is said that the lien attaches.² The parties may agree that the acceptance of a note of a third party shall not waive the lien.³

§ 1267. **Agreement to give security.**—If there be an agreement to give a mortgage as security for the payment of the purchase money, the lien is not waived until the mortgage is executed and delivered.⁴ If a bond has been given for title on the payment of the purchase money, and subsequently the vendor executes a deed to the vendee on the latter's promise to give personal security for the purchase money, which promise he fails to keep, the vendor

¹ *Bradford v. Marvin*, 2 Fla. 463, 473, per Mr. Justice Hawkins.

² *Harris v. Hanks*, 25 Ark. 510. See *Wilson v. Lyon*, 51 Ill. 166.

³ *Lord v. Wilcox*, 99 Ind. 491. See *Hunt v. Marsh*, 80 Mo. 396, to the effect that the acceptance of other security than the note of the purchaser is only *prima facie* a waiver of the lien. It is said by Earl, J., in a recent case in New York: "The examination of many authorities shows that the vendor's lien is not now a favorite with courts of equity, and that it has many times been enforced with reluctance and misgivings. Equity judges have found it difficult to find any justifiable basis for it to rest on, and they have differed as to the grounds and reasons for its introduction into the equity jurisprudence of England and of this country. It has been repudiated in some of the states by the courts, and in others it has been abrogated by legislative enactments. It is against the general policy of our law, which looks with disfavor upon secret interests in real estate, and requires, generally, that titles to real estate shall be created by some writings which shall be spread upon the public records for the protection of those who might trust to titles apparently sound, but afflicted with secret infirmities. It generally gives way to a legal interest or to a superior equity, and, as it is a matter of purely equitable cognizance, it should never be enforced when it would be inequitable to do so. Hence, it is never allowed to prevail against one who takes an encumbrance upon the land, or an interest therein, or a conveyance thereof, in good faith, without notice of the lien, and for a valuable consideration parted with before such notice: *Maroney v. Boyle*, 141 N. Y. 462; 38 Am. St. Rep. 821. That the tendency of the decisions is to restrict the lien, see *Peters v. Tunnell*, 43 Minn. 473; 19 Am. St. Rep. 252; *Richards v. Learning*, 27 Ill. 431; 81 Am. Dec. 239.

⁴ *Jones v. Vantress*, 23 Ind. 533.

as against him is entitled to a lien on the land.¹ So, the lien is not affected by a verbal agreement by the grantee to reconvey the land to the grantor in case of his failure to pay the consideration for the conveyance.²

§ 1268. **Worthless security.**—The general rule undoubtedly is that the lien is waived by taking the independent security, and if such independent security prove to be worthless, this has no effect upon the waiver. But there are some cases which may be regarded as exceptions to this rule or in conflict with it. If through the fraud of the vendee the vendor accepts worthless security, it is held that his lien is not waived.³ Where a purchaser asked for an extension of time for the payment of an amount still due, under a contract of purchase, but the vendor refused unless the purchaser would repurchase the land and pay an increased amount, and the purchaser consenting, the vendor executed a deed and took back a mortgage for such increased amount, the pretended resale was held to be a mere cover for usury, and the mortgage was declared void; but the original debt was held not to be merged in the void mortgage, but to be secured by an equitable lien upon the land as a part of the purchase money due upon the original contract.⁴ It has been held that the lien is not lost when the purchase money has been secured by an invalid deed of trust.⁵ But the debt itself is not invalidated by the fact that the mortgage given to secure it is void.⁶

¹ *Dunlap v. Burnett*, 5 Smedes & M. (13 Miss.), 702; 45 Am. Dec. 269.

² *Gallagher v. Mars*, 50 Cal. 23.

³ *Crippen v. Heermance*, 9 Paige, 211; *Skinner v. Purnell*, 52 Mo. 96. See *Burger v. Hughes*, 5 Hun, 180; *Dubois v. Hall*, 43 Barb. 26.

⁴ *Crippen v. Heermance*, 9 Paige, 211.

⁵ *Champlin v. McLeod*, 53 Miss. 484. And see *Haugh v. Blythe*, 20 Ind. 24; *Tobey v. McAllister*, 9 Wis. 463; *Fowler v. Rust*, 2 Marsh. A. K. 294; *Coit v. Fougere*, 36 Barb. 195; *Davis v. Cox*, 6 Ind. 481; *Duke v. Balme*, 16 Minn. 306. See, also, *Hollis v. Hollis*, 4 Baxt. 524. But see, as to lien lost by taking security although worthless, *Camden v. Vail*, 23 Cal. 633; *Hunt v. Waterman*, 12 Cal. 301.

⁶ *Shaver v. B. R. & A. Co.*, 10 Cal. 396.

§ 1269. **Subsequent purchasers.**—A subsequent purchaser in good faith, for value, who has no notice of the lien, takes the land free from the lien.¹ A representation by a vendor of the nonexistence of the lien may estop him from asserting it against a subsequent purchaser.² An assignee in bankruptcy, or an assignee for the benefit of creditors, takes the land subject to the lien.³ So does a mere volunteer.⁴ The purchaser must have paid a new consideration before he is in a position to defeat the lien.⁵

¹ *Adams v. Buchanan*, 49 Mo. 64; *Moshier v. Meek*, 80 Ill. 79; *Thurman v. Stoddard*, 63 Ala. 336; *Bankhead v. Owen*, 60 Ala. 457; *Fisk v. Potter*, 2 Abb. N. Y. App. 138; *Bayley v. Greenleaf*, 7 Wheat. 46; *Cator v. Pembroke*, 1 Bro. C. C. 301; *Short v. Battle*, 52 Ala. 456; *Woody v. Fislar*, 55 Ind. 592; *Growning v. Behn*, 10 Mon. B. 383; *Johnson v. Cawthorn*, 1 Dev. & B. Eq. 32; 27 Am. Dec. 250. And see *Gann v. Chester*, 5 Yerg. 205; *Hulett v. Whipple*, 58 Barb. 224; *Aldridge v. Dunn*, 7 Blackf. 249; 41 Am. Dec. 224; *Taylor v. Baldwin*, 10 Barb. 626; *Webb v. Robinson*, 14 Ga. 216; *New York and Cleveland Gas Coal Co. v. Plumer*, 96 Pa. St. 99; *Robinson v. Williams*, 22 N. Y. 380; *Cook v. Banker*, 50 N. Y. 655; *Moore v. Holcombe*, 3 Leigh, 597; 24 Am. Dec. 683; *Allen v. Loring*, 34 Iowa, 499. See, as to the facts necessary to be set out by a subpurchaser claiming to be such in good faith, without notice, *Hooper v. Strahan*, 71 Ala. 75. Purchasers, with notice of the nonpayment of the purchase money, take subject to the lien: *Thomas v. Bridges*, 73 Mo. 530; *Graves v. Coutant*, 31 N. J. Eq. 763; *Woodall v. Kelly*, 85 Ala. 368; 7 Am. St. Rep. 57; *Whetsel v. Roberts*, 31 Ohio St. 503; *Thornton v. Knox*, 6 B. Mon. (Ky.) 74; *Merrett v. Wells*, 18 Ind. 171; *Swan v. Benson*, 31 Ark. 728; *Orrick v. Durham*, 79 Mo. 174; *Watson v. Wells*, 5 Conn. 468.

² *Atkinson v. Lindsey*, 39 Ind. 296; *Reilly v. Miami Exporting Co.*, 5 Ohio, 333; *Henson v. Westcott*, 82 Ill. 224; *Burns v. Taylor*, 23 Ala. 255; *Thompson v. Dawson*, 3 Head, 384. See *Rowland v. Day*, 17 Ala. 681.

³ *In re Perdue*, 2 Nat. Bank Reg. 183; *Bowles v. Rogers*, 6 Ves. 95; *Pearce v. Foreman*, 29 Ark. 563; *Brown v. Vanlier*, 7 Humph. 239; *Walton v. Hargroves*, 42 Miss. 18; 97 Am. Dec. 429; *Shirley v. Sugar Refinery*, 2 Edw. Ch. 505; *Green v. Demoss*, 10 Humph. 371; *Warren v. Fenn*, 28 Barb. 333; *Fawell v. Heelis*, Amb. 724; *Ex parte Peak*, 1 Madd. 191; *Exchange etc. Bank v. Stone*, 80 Ky. 109. See *Fisk v. Potter*, 2 Abb. N. Y. App. 138; *Corlies v. Howland*, 26 N. J. Eq. 311. See, as to purchaser under trust deed, to secure pre-existing indebtedness, *Bailey v. Tindall*, 59 Tex. 540. See *Boling v. Howell*, 93 Ind. 329.

⁴ *Tucker v. Hadley*, 52 Miss. 414. And see *Upshaw v. Hargrove*, 6 Smedes & M. 286; *Doyle v. Orr*, 51 Miss. 229; *Taylor v. Alloway*, 3 Litt. 216; *Davis v. Pearson*, 44 Miss. 508; *Marsh v. Turner*, 4 Mo. 253; *Russell v. Watt*, 41 Miss. 602; 93 Am. Dec. 270.

⁵ *Walton v. Hargroves*, 42 Miss. 18; 97 Am. Dec. 429; *Perkins v. Swank*, 43 Miss. 349; *Chance v. McWhorter*, 26 Ga. 315; *Bailey v. Tindall*, 59 Tex. 540.

And the payment of the consideration must have been made before the receipt of notice.¹ But if he has made part payment before notice, he will be protected *pro tanto*.²

§ 1270. Notice.—A purchaser has notice of the fact that the purchase money has not been paid when the deed under which his grantor holds contains a recital to this effect.³ A purchaser will not be excused from notice because he relies upon an abstract of title which does not give the contents of the conveyances constituting the chain of title. By so doing he is guilty of negligence, and no equity in his favor can be raised by the fact that such is the usual custom in the transfer of real estate.⁴ Concerning this practice, Mr. Justice Atwater, in delivering the opinion of the court, observed: "The gross carelessness which here prevails with reference to such transfers has become proverbial, and is the fruitful source of litigation, and should be sanctioned by courts of justice no further than may be absolutely required by the true construction of statutes relating thereto. And instead of encouraging the practice of relying upon abstracts of title, made without reference to the contents of recorded instruments (as the counsel seem to think desirable), it should be regarded with extreme disfavor."⁵ Where the deed states that the consideration is yet "to be paid," a purchaser has notice. It is his duty to inquire, and he is affected with all the knowledge he would have obtained had he prosecuted the inquiry.⁶ So a subsequent purchaser has notice where the consideration

¹ Dresser v. Md. & Iowa Ry. Construction Co., 93 U. S. 92; Campbell v. Roach, 45 Ala. 667. See Weaver v. Barden, 49 N. Y. 286.

² Craft v. Russell, 67 Ala. 9.

³ Eichelberger v. Gitt, 104 Pa. St. 64; Daughaday v. Paine, 6 Minn. 443; Willis v. Gay, 48 Tex. 463; 26 Am. Rep. 328; Cordova v. Hood, 17 Wall. 1; Thornton v. Knox, 6 Mon. B. 74; Tiernan v. Thurman, 14 Mon. B. 277; Masich v. Shearer, 49 Ala. 226; McAlpine v. Burnett, 23 Tex. 649; McRimmon v. Martin, 14 Tex. 318.

⁴ Daughaday v. Paine, 6 Minn. 443.

⁵ Daughaday v. Paine, 6 Minn. 443.

⁶ Cordova v. Hood, 17 Wall. 1.

recited is "the sum of seven thousand dollars to her by the party of the second part, paid thus—by giving his three promissory notes, of even date herewith, each for \$2,333.33, the first payable two, the second four, and the last six months after date."¹ Any notice which can be said to be either actual or constructive is sufficient to bind the purchaser.² But the fact of notice must be satisfactorily established, which, of course, cannot be done by loose, vague, and uncertain evidence.³ But when notice is once brought home to the purchaser, it is clear that the land still remains subject to the lien.⁴ The lien may be enforced against the administrator of the purchaser,⁵ or his heirs.⁶

§ 1271. **Unrecorded deed.**—The grantee, if he afterward conveys the land to the grantor, will have a lien for the unpaid purchase price. A, who was the owner of a tract of land, conveyed the same by deed to B, who entered into possession but never recorded his deed. B afterward sold the land to A, and gave him a bond for title, placed him in possession, but did not execute a deed.

¹ *Masich v. Shearer*, 49 Ala. 226.

² *Wilson v. Lyon*, 51 Ill. 166; *Baum v. Grigsby*, 21 Cal. 176; 81 Am. Dec. 153; *Tharpe v. Dunlap*, 4 Heisk. 674; *Harshbarger v. Foreman*, 81 Ill. 364; *Autrey v. Whitmore*, 31 Tex. 623; *Ledos v. Kupfrian*, 28 N. J. Eq. 161; *Briscoe v. Bronaugh*, 1 Tex. 326; 46 Am. Dec. 108; *Tiernan v. Thurman*, 14 Mon. B. 277; *Parker v. Foy*, 43 Miss. 260; 55 Am. Rep. 484; *Manly v. Slason*, 21 Vt. 271; 52 Am. Dec. 60.

³ *Harshbarger v. Foreman*, 81 Ill. 364. It is held that the vendor remaining in possession of the land as lessee is not notice to a purchaser that the purchase money has not been paid: *White v. Wakefield*, 7 Sim. 401. See *Eyre v. Sadlier*, 14 Irish Ch. 119; s. c. 15 Irish Ch. 1; *Cator v. Pembroke*, 1 Bro. C. C. 301.

⁴ *Gordon v. Bell*, 50 Ala. 213; *Webb v. Robinson*, 14 Ga. 216; *Stroud v. Pace*, 35 Ark. 100; *Ledos v. Kupfrian*, 28 N. J. Eq. 161; *Sampley v. Watson*, 43 Ala. 377; *Corlies v. Howland*, 26 N. J. Eq. 311; *Shall v. Biscoe*, 18 Ark. 142; *Carr v. Hobbs*, 11 Md. 285; *Champion v. Brown*, 6 Johns. Ch. 398; 10 Am. Dec. 343; *Dodge v. Evans*, 43 Miss. 570; *Mackreth v. Symmons*, 15 Ves. 329; *Merritt v. Wells*, 18 Ind. 171; *Burt v. Wilson*, 28 Cal. 632; 87 Am. Dec. 142; *Bulger v. Helly*, 47 Ala. 453.

⁵ *Cahoon v. Robinson*, 6 Cal. 225.

⁶ *Burt v. Wilson*, 28 Cal. 632; 87 Am. Dec. 142.

C for a valuable consideration, and without notice of the vendor's lien of B, purchased the land from A while he was in possession. C had no notice of B's lien until he had received his deed and paid the greater part of the purchase money to A. The land, it was held, became discharged of the vendor's lien, except as to the part of the purchase money still due from C to A at the time the former received notice of B's lien.¹

§ 1272. **Enforcement of lien.**—The better rule, it seems to us, is, that the vendor may enforce his lien in equity without first attempting to collect his debt by an action at law.² Still there is authority for the proposition that before the vendor can resort to equity, he must have exhausted his legal remedy.³ The heir or devisee of the vendee generally may require the payment of the unpaid purchase money to be made out of the personal property.⁴ Where the lien is considered an incident of the debt, it cannot be enforced after the debt is barred by the statute of limitations.⁵ To bind subsequent purchasers, they should be made parties to the suit.⁶ Where different

¹ *Mitchell v. Dawson*, 23 W. Va. 86.

² *Pratt v. Clark*, 57 Mo. 189; *Stewart v. Caldwell*, 54 Mo. 536; *Campbell v. Roach*, 45 Ala. 667; *Sparks v. Hess*, 15 Cal. 186; *Bradley v. Bosley*, 1 Barb. Ch. 125; *High v. Batte*, 10 Yerg. 186; *Dubois v. Hull*, 43 Barb. 26; *Richardson v. Baker*, 5 Marsh. J. J. 323; *Owen v. Moore*, 14 Ala. 640; *Burgess v. Fairbanks*, 83 Cal. 215; *Mayes v. Hendry*, 33 Ark. 240.

³ See *Gilman v. Brown*, 1 Mason, 191; *Pratt v. Vanwyck*, 6 Gill & J. 495; *Bottorf v. Conner*, 1 Blackf. 287; *Eyler v. Crabbs*, 2 Md. 137; 56 Am. Dec. 711; *Martin v. Cauble*, 72 Ind. 67; *Russell v. Todd*, 7 Blackf. 239; *Richardson v. Stillinger*, 12 Gill & J. 477; *Ridgeway v. Toram*, 2 Md. Ch. 303. And see *Ford v. Smith*, 1 McAr. 592; *Roper v. McCook*, 7 Ala. 318.

⁴ *Warner v. Van Alstyne*, 3 Paige, 513; *Wright v. Holbrook*, 32 N. Y. 587; *Sutherland v. Harrison*, 86 Ill. 363; *Livingston v. Newkirk*, 3 Johns. Ch. 312; *Lamport v. Beeman*, 34 Barb. 239.

⁵ *Ball v. Hill*, 48 Tex. 634; *Pitschki v. Anderson*, 49 Tex. 1; *Trotter v. Erwin*, 27 Miss. 772; *Hale v. Baker*, 60 Tex. 217. But see, on the other hand, *Flinn v. Barber*, 61 Ala. 530; *Stephens v. Shannon*, 43 Ark. 464; *Bizzell v. Nix*, 60 Ala. 281; 31 Am. Rep. 38; *Baltimore & Ohio R. R. Co. v. Trimble*, 51 Md. 99; *Magruder v. Peter*, 11 Gill & J. 217. But see *Ware v. Currey*, 67 Ala. 274.

⁶ *Turner v. Phelps*, 46 Tex. 251; *Davis v. Rankin*, 50 Tex. 279; *Carter*

tracts of land have been sold at different times, the lien upon each parcel is distinct. One decree should not be entered for the aggregate amount of the lien.¹ Recovery of a judgment upon the note does not destroy the lien.² The land should be sufficiently described in the bill.³ In those States where the lien is assignable, a purchaser with notice who pays off the lien succeeds to the rights of the vendor.⁴ A tax sale and certificate operating as a cloud upon the title, and tending to defeat the enforcement of the lien, may be set aside in equity under the bill to enforce the lien.⁵ But as a judgment lien does not affect a vendor's lien, the vendor cannot obtain an injunction against a sale under the execution. The sale could not affect him, as his rights after the sale would be the same as they had been before.⁶

v. Attoway, 46 Tex. 108; *Randle v. Boyd*, 73 Ala. 282. The lien passes with a specific bequest of the claim for the purchase money: *Lavender v. Abbott*, 30 Ark. 172; *Tiernan v. Beam*, 2 Ohio, 383; 15 Am. Dec. 557. The decree may allow a time for redemption: *Webber v. Mackey*, 4 Bradw. (Ill.) 458.

¹ *Edwards v. Edwards*, 5 Heisk. 123. Only so much of the land can be decreed to be sold as will be sufficient to pay the note due, where there are different notes: *Burton v. McKinney*, 6 Bush, 428; *Emison v. Resque*, 9 Bush, 24.

² *Ball v. Hill*, 48 Tex. 634; *Beck v. Tarrant*, 61 Tex. 402; *Slaughter v. Owens*, 60 Tex. 668; *In re Perdue*, 2 Nat. Bank. Reg. 183; *Palmer v. Harris*, 100 Ind. 276. But see *Clark v. Stilson*, 36 Mich. 482; *Dickason v. Eby*, 73 Mo. 133. The lien is enforced by a suit in equity: *Barker v. Smark*, 3 Beav. 64. The lien is barred by such time as would bar a mortgage: *Thompson v. Thompson*, 3 Lea (Tenn.), 126. As to the parties to a suit after the vendor's or the vendee's death, see *McKay v. Green*, 3 Johns. Ch. 56; *Dayhuff v. Dayhuff*, 81 Ill. 499; *Knight v. Blanton*, 51 Ala. 333; *Edwards v. Edwards*, 5 Heisk. 123; *Thornton v. Neal*, 49 Ala. 590; *Converse v. Sorely*, 39 Tex. 515; *Jackson v. Hill*, 39 Tex. 493.

³ *Williams v. Roe*, 59 Ala. 629; *Long v. Pace*, 42 Ala. 495. And see generally, as to foreclosure proceedings, *Gordon v. Bell*, 50 Ala. 213; *White v. Downs*, 40 Tex. 225; *Reed v. Gregory*, 46 Miss. 740; *Milner v. Ramsey*, 48 Ala. 287; *Cohen v. Woollard*, 2 Tenn. Ch. 686; *Leird v. Abernathy*, 10 Heisk. 626. See, also, *Munford v. Pearce*, 70 Ala. 452.

⁴ *Planters' Bank v. Dodson*, 17 Miss. (9 Smedes & M.) 527.

⁵ *Johnston v. Smith*, 70 Ala. 108.

⁶ *Messmore v. Stephens*, 83 Ind. 524. See, as to the rights of one claiming under an execution levied on land subject to a vendor's lien, *Bowman v. Faw*, 5 Lea (Tenn.), 472.

CHAPTER XXXVI.

ESTOPPEL BY DEED.

- § 1273. Estoppel by deed—In general.
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- § 1315. Estoppel of grantor in trust deed.
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§ 1273. **Estoppel by deed—In general.**—The word “estoppel” is applied to those conclusive admissions which the policy of the law will not permit to be denied or controverted. Of the one that we propose to consider, estoppel by deed, it is said: “No person can be allowed to dispute his own solemn deed, which is therefore conclusive against him, and those claiming under him, even as to the facts recited in it. The general rule is that an indenture estops all who are parties to it, while a deed-poll only estops the party who executes it, since it is his sole language and act.”¹

§ 1274. **From what doctrine arose.**—The doctrine of estoppel by deed arose probably from the solemnity and importance attached to the act which made the instrument a deed, that is, the affixing of a seal. But at the present day the doctrine is not based upon this ground; for where all distinctions between sealed and unsealed instruments have been abolished, the rules of estoppel that at common law applied to sealed instruments, apply now substantially with equal force to conveyances affecting the title to land. We have had occasion to notice this, in treating of the effect of statutes abolishing the distinction between sealed and unsealed instruments.² The common-law principles giving security to conveyances of real estate still survive, notwithstanding that the legal effect of a deed, as an operative transfer of title, may no longer depend upon the fact that it is under seal.³

¹ Shep. Touch. 53; Wharton's Law Lexicon, tit. Estoppel; Abb. Law Dict., tit. Estoppel.

² Vol. I, § 249.

³ Jones v. Morris, 61 Ala. 518, 524. And see generally on estoppel by

§ 1275. **Validity of deed.**—In order that a deed may operate as an estoppel, it is essential that the deed should be valid as a transfer of the grantor's interest.¹ Thus, where the deed of an Indian proprietor to a person not a proprietor is void, the heirs of the grantor are not estopped from setting up title to the land described in such deed.² The case just cited is an illustration of the principle well

deed, *Stewart v. Metcalf*, 68 Ill. 109; *Hill v. Den*, 54 Cal. 6; *Noe v. Splivalo*, 54 Cal. 207; *Delaney v. Dutcher*, 23 Minn. 373; *Rankin v. Warner*, 2 Lea, 302; *Buchanan v. Kimes*, 2 Baxt. 275; *Tartar v. Hall*, 3 Cal. 263; *Tewksbury v. Provizzo*, 12 Cal. 20; *Morrison v. Wilson*, 13 Cal. 494; 73 Am. Dec. 593; *Gee v. Moore*, 14 Cal. 472; *Clark v. Baker*, 14 Cal. 612; 76 Am. Dec. 449; *Dodge v. Walley*, 22 Cal. 224; 83 Am. Dec. 61; *Coles v. Soulsby*, 21 Cal. 47; *Flandreau v. Downey*, 23 Cal. 354; *San Francisco v. Lawton*, 18 Cal. 465; 79 Am. Dec. 187; *Franklin v. Dorland*, 28 Cal. 175; 87 Am. Dec. 111; *Tunnell v. Burton*, 4 Del. Ch. 382; *Wilcoxson v. Osborn*, 77 Mo. 621; *Cooper v. Watson*, 73 Ala. 252; *Charleston City Council v. Caulfield*, 19 S. C. 201; *Hasenritter v. Kirchhoffer*, 79 Mo. 239; *Haven v. Seeley*, 59 Cal. 494; *Rutherford v. Stamper*, 60 Tex. 447; *Cunningham v. Cunningham*, 20 S. C. 317; *Bixby v. Bent*, 59 Cal. 522; *Zimler v. San Luis W. Co.*, 57 Cal. 221; *Hannah v. Collins*, 94 Ind. 201; *Peterson v. Brown*, 17 Nev. 172; 45 Am. Rep. 437; *Karnes v. Wingate*, 94 Ind. 594; *McCarty v. St. Paul, Minneapolis etc. Ry. Co.*, 31 Minn. 278; *Dobbins v. Cruger*, 108 Ill. 188; *Calkins v. Copley*, 29 Minn. 471; *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548; *Traver v. Baker*, 8 Saw. 535; 15 Fed. Rep. 186; *Watters v. Connelly*, 59 Iowa, 217; *Crawford v. Mobile & Girard R. R. Co.*, 67 Ga. 405; *Styles v. Price*, 64 How. Pr. 227; *McNeil v. Jordan*, 28 Kan. 7; *Fretelliere v. Hindes*, 57 Tex. 392; *Chapman v. Miller*, 130 Mass. 289; *Sherman v. Kane*, 86 N. Y. 57; *Preston v. Evans*, 56 Md. 476; *Jones v. Reese*, 65 Ala. 134; *McDonald v. Lusk*, 9 Lea (Tenn.), 654; *Reeves v. Vinacke*, 1 McCrary C. C. 213; *Faulks v. Kamp*, 17 Blatchf. 432; *Williamson v. Williamson*, 71 Me. 442; *Smith v. Williams*, 44 Mich. 240; *De Witt v. Van Schoyk*, 35 Hun, 103; *Bryan v. Uland*, 101 Ind. 477; *Williams v. Champion*, 39 N. J. Eq. 350; *Carson v. New Bellevue Cemetery Co.*, 104 Pa. St. 575; *Perrin v. Perrin*, 62 Tex. 477; *Randall v. Lower*, 98 Ind. 255; *Philadelphia v. Ash*, 15 Phila. 45; *Scott v. Briscoe*, 36 La. Ann. 278; *Howard v. Massengale*, 13 Lea (Tenn.), 577; *Utterback v. Phillips*, 81 Ky. 62; *Root v. Wright*, 21 Hun, 344; *Esterbrook v. Savage*, 21 Hun, 145; *Tufts v. Du Bigeon*, 61 Ga. 322; *Real Estate Trust Co. v. Balch*, 45 N. Y. Sup. Ct. 528; *Dorris v. Smith*, 7 Or. 267; *Hobson v. Edwards*, 57 Miss. 128; *Morris v. Daniels*, 35 Ohio St. 407; *Mull v. Orme*, 67 Ind. 95.

¹ *Conant v. Newton*, 126 Mass. 105; *James v. Wilder*, 25 Minn. 305; *Caffrey v. Dudgeon*, 38 Ind. 512; 10 Am. Rep. 126; *Merriam v. Boston, Clinton etc. R. R. Co.*, 117 Mass. 241; *Shevlin v. Whelan*, 41 Wis. 88; *Pells v. Webquish*, 129 Mass. 469.

² *Pells v. Webquish*, 129 Mass. 469.

established, that an estoppel does not arise from a deed which is prohibited by statute.¹

§ 1276. **Deed void in part.**—Where a deed is only partially void, the part that is good may work an estoppel.² So if a husband and wife join in a conveyance, and the conveyance be void as to the wife, it may still bind the husband by estoppel.³

§ 1277. **Registration of deed.**—The grantor will not be permitted to claim that the purchaser should have placed his deed on record, in order to prevent a wrongful transfer by the grantor subsequently of the same title to another.⁴ A executed a deed to C, containing a recital that he had previously conveyed the land to B, and that he had conveyed it to C. Prior to the execution of the deed, B had given a written statement that he had conveyed the land by deed to C, but neither of these two deeds referred to in the recitals was placed on record, nor was there any proof that either existed. The court held that neither A nor B could deny title in C.⁵ A person who, after receiving a deed, delivers it to the proper officer for registration, and, several years later, after the death of the grantor, and the grantor's grantor, on learning of the officer's neglect, causes it to be recorded, is not estopped from claiming the land in the absence of proof that the heirs had been misled to their damage.⁶

¹ Doe dem. *Preece v. Howells*, 2 Barn. & Adol. 744; Doe dem. *Chandler v. Ford*, 3 Ad. & E.

² *Daniels v. Tearney*, 102 U. S. 415; *United States v. Hodson*, 10 Wall. 395. If a deed be void for want of a proper description, yet if it has always been treated as valid by the grantor, and he has induced the grantee to erect buildings on the land, his heirs are estopped to deny its validity: *Patterson v. Patterson* (Tex. Civ. App., Oct. 10, 1894), 27 S. W. Rep. 837.

³ *Chapman v. Abrahams*, 61 Ala. 108; *Wellborn v. Finley*, 7 Jones, 228. And see *North v. Henneberry*, 44 Wis. 306; *Albany Ins. Co. v. Bay*, 4 Comst. 9. See, also, *Housatonic Bank v. Martin*, 1 Met. 294; *Germond v. People*, 1 Hill, 343; *Jackson v. Brinckerhoff*, 3 Johns. Cas. 101.

⁴ *Williamson v. Williamson*, 71 Me. 442.

⁵ *Howard v. Massengale*, 13 Lea (Tenn.), 577.

⁶ *Love v. Stone*, 56 Miss. 449.

§ 1278. When truth appears, no estoppel.—A party is not estopped from showing the truth when the truth appears upon the instrument itself.¹ “The principle is that an estoppel concludes the party from alleging the truth; and, therefore, a man who admits a fact or deed in general terms, either by reciting it in an instrument executed by him, or by acting under it, shall not be received to deny its existence. But when the truth appears by the same deed or record, which would otherwise work the estoppel, then the adverse party shall not be estopped to take advantage of the truth; for he cannot be estopped to allege the truth when it appears of record. Lord Coke in his commentary on Littleton, who gives the rule contended for, at the same time makes this exception; and Baron Comyn in his valuable digest confirms both the rule and the exception.² Two cases are put by them to exemplify the exception. The first is the case of a fine levied, or concord made upon an original on which a retraxit is entered. The parties are estopped to say when the fine is pleaded, that it was not upon an original (for it shall be intended well levied), yet if it appears by the same record that a retraxit was entered on the original, then the parties are not estopped to say it; for it appears by the record itself. The second is an impropriation to a bishop of a rectory, after the death of the incumbent; and by indenture showing the matter, the bishop demises the rectory for years in the life of the incumbent, and the lease is confirmed by the dean and chapter. The bishop is not estopped by the indenture of demise, for it appears by the same deed that he then had nothing in the rectory.”³

¹ *Wheelock v. Henshaw*, 19 Pick. 341; *Sinclair v. Jackson*, 8 Cowen, 543; *Cuthbertson v. Irving*, 4 Hurl. & N. 742; *Pelletreau v. Jackson*, 11 Wend. 110, 118; *Pargeter v. Harris*, 7 Q. B. 708.

² Citing Com. Dig. Estoppel (E. 2).

³ *Sinclair v. Jackson*, 8 Cowen, 586. See *Saunders v. Merryweather*, 3 Hurl. & C. 902; *Morton v. Woods*, Law R. 4 Q. B. 293.

§ 1279. **Parties bound.**—The general rule is that only parties and privies are bound by an estoppel.¹ “It is an unprecedented extension of the doctrine of equitable estoppel to hold that a man is bound to the world to make good what he has said to any one, if others choose to rely upon it. If every man may be held liable not only to parties and privies to his deed, but to all mankind, to make good every introductory recital which the deed contains, it behooves him to avoid all recitals, and be careful what scrivener he employs. Such is not the law, and there are no authorities which assert it.”² A grantee is not bound by a recital in a deed in favor of a stranger.³ Where a stranger to a deed introduces it in evidence for the purpose of establishing, as against a subsequent grantee, an admission by the parties to the deed, the grantee is not estopped from showing that the provision upon which reliance is placed was inserted by mistake.⁴ A conveyed land with full covenants to B, who subsequently ceded it to the government of the United States, and A purchased the land from the government. After B had ceded the land to the government, he executed a deed of the land to C. The latter, it was decided, could

¹ *Sunderlin v. Struthers*, 47 Pa. St. 411; *Kitzmiller v. Rensselaer*, 10 Ohio St. 63; *Cottle v. Sydnor*, 10 Mo. 763. One who is not a party to a deed cannot urge that the grantee is estopped to deny the operation of a stipulation in the deed when such party has not himself been misled or injured by the stipulation: *McKinney v. Lanning*, 139 Ind. 170; 38 N. E. Rep. 601.

² Mr. Justice Strong, in the concurring opinion rendered by him in *Sunderlin v. Struthers*, 47 Pa. St. 411, 423. See, also, *Ray v. Gardner*, 82 N. C. 146; *Griffin v. Richardson*, 11 Ired. 439.

³ *Schuhman v. Garratt*, 16 Cal. 100. A grantor is estopped by a clause in a deed conveying a specified interest in land with a covenant of warranty to deny that the deed conveyed such interest: *Logan v. Eaton*, 66 N. H. 575; 31 Atl. Rep. 13. Where a married woman represents that she is a widow and executes a deed in the capacity of a single woman for a valuable consideration, and, after the death of her husband, conveys the land, without consideration, to her daughter, who has actual notice of the prior deed, the daughter is estopped, and cannot assert that her mother was a widow at the time of the execution of the prior deed: *Ramboz v. Stowell*, 103 Cal. 588.

⁴ *Pope v. O'Hara*, 48 N. Y. 446.

not set up an estoppel against A by reason of the covenants, nor did his subsequently acquired title inure to the benefit of C. By the cession to the government the covenants became extinguished.¹ Where a clerk of a board of supervisors has assigned a tax certificate without the board's authority, and an estoppel rests upon the county against objecting to the assignment, or the deed subsequently made, the owner of the land which had been sold for taxes cannot take advantage of the original defect of authority.²

§ 1280. **Representative capacity.**—A deed can bind a party by way of estoppel only in the capacity in which he executes it. One who executes a deed as the attorney in fact for another is not precluded from subsequently setting up a title to the land, which had been acquired by him prior to the execution of the deed from the person for whom he acted as attorney in fact.³ Prior to a sale by an administratrix she agreed verbally with one who became the purchaser, that if a certain sum was bid for the land she would waive her right of dower, and in accordance with this agreement the premises were bid off. She executed a deed to the purchaser in the ordinary form, with a covenant against her own acts. No estoppel was held to exist, as the deed having been executed by her in a representative character, the covenant against her own acts was confined to those relating to her representative capacity, and did not interfere with the assertion of

¹ *Goodel v. Bennett*, 22 Wis. 565. See *Avery v. Judd*, 21 Wis. 262.

² *Woodman v. Clapp*, 21 Wis. 350. A recital will bind by estoppel the grantor and his privies: *Stoutimore v. Clark*, 70 Mo. 471; *Kinsman v. Loomis*, 11 Ohio, 475; *Usina v. Wilder*, 58 Ga. 178; *Pinckard v. Milmine*, 76 Ill. 453; *Byrne v. Morehouse*, 22 Ill. 603; *Simson v. Eckstein*, 22 Cal. 580; *Hasenritter v. Kirchhoffer*, 79 Mo. 239; *Rangely v. Spring*, 28 Me. 127; *Carver v. Jackson*, 4 Pet. 1; *Jackson v. Parkhurst*, 9 Wend. 209; *West v. Pine*, 4 Wash. 691; *Chautauqua Co. Bank v. Risley*, 4 Denio, 480; *Stronghill v. Buck*, 14 Q. B. 781; *Doe v. Porter*, 3 Ark. 18; 36 Am. Dec. 448.

³ *Smith v. Penny*, 44 Cal. 161.

her individual rights.¹ But it is held that where a guardian of a person *non compos mentis* sell real estate belonging to his ward under permission of the court, and in the deeds covenants that he is duly authorized to sell, he is estopped by the covenant from asserting a claim in his own right to any portion of the land.² But it is held that an executor is not estopped by the recital in his deed that he is such executor.³ But a person who executes a lease to a body claiming to be a corporation, cannot deny its corporate existence for the purpose of defeating the instrument.⁴

§ 1281. **Estate bound.**—A grantor whose covenants are confined to an estate acquired under certain tax deeds is not estopped from setting up another title in himself or from denying the validity of the tax sale.⁵ A grantee is not estopped from denying his grantor's title when the only title asserted is the precise title obtained from the grantor, or when both claim from a common source in which the title is identical.⁶ Where two persons, representing that they are the sole owners of a piece of land and that it is free from encumbrances, convey it to another, who believes the representation, if one of the grantors afterward acquires from his sister an outstanding title which he knew existed at the time of the repre-

¹ *Wright v. De Groff*, 14 Mich. 164. And see *Gouldsmith v. Coleman*, 57 Ga. 425; *Doe d. Hornby v. Glenn*, 1 Ad. & E. 49.

² *Heard v. Hall*, 16 Pick. 457. And see *Poor v. Robinson*, 10 Mass. 131.

³ *Larco v. Casaneuava*, 30 Cal. 560. Where, on the strength of the signature and acknowledgment of a deed of trust by a married woman, a person advances money on the land, she cannot contend, as against such person, that her husband deceived her into believing that a tract of land other than that described was embraced by the deed: *Paxton v. Marshall*, 18 Fed. Rep. 361. As to the estoppel of a married woman in claiming an after-acquired interest, see *Edwards v. Davenport*, 20 Fed. Rep. 756.

⁴ *Whitney v. Robinson*, 53 Wis. 309.

⁵ *Sanford v. Sanford*, 135 Mass. 314. See *Erwin v. Morris*, 26 Kan. 664.

⁶ *Wilcoxson v. Osborn*, 77 Mo. 621.

sentation, he is estopped from asserting this after-acquired title against the purchaser.¹

§ 1282. **Resulting trust.**—If the property in the grantor's hands is subject to a resulting trust in favor of another, the rule that a subsequently acquired title inures to the benefit of the grantee does not apply.²

§ 1283. **Privies.**—A grantee is not prevented by the recitals in a deed of his grantor from asserting a paramount title acquired from another source.³ Where a purchaser from one holding an undivided interest in land enters as a stranger to the rights of his cotenants, he is not estopped from setting up against them a tax title or

¹ *Karnes v. Wingate*, 94 Ind. 594. See as to enforcement of judgment obtained before execution of warranty deed, *Dobbins v. Cruger*, 108 Ill. 188. In an action of ejectment, a defendant who alleges that he executed a deed under which plaintiff claims without consideration, for the purpose of defrauding creditors, and that the deed was accepted by plaintiff with this knowledge, and that he promised to reconvey to the defendant, who had continuously retained the possession, does not state a defense: *Peterson v. Brown*, 17 Nev. 172; 45 Am. Rep. 437. Where a receiver's sale is made under order of court in general terms, a purchaser may dispute the validity of a mortgage then existing: *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548. But a deed "subject to all liens and encumbrances of record" estops the grantee from disputing the validity of a recorded mortgage: *Styles v. Price*, 64 How. Pr. 227. But where the deed is not subject to the mortgage, the deed containing merely the covenant that the premises "are free from all encumbrances except a mortgage to a certain person," the grantee is not estopped from denying the validity of the mortgage: *Calkins v. Copley*, 29 Minn. 471. And see *Watters v. Connelly*, 59 Iowa, 217. A mortgagor cannot deny his title as recited in the mortgage: *Mitchell v. Kinnard* (Ky., Jan. 30, 1895), 29 S. W. Rep. 309.

² *Fretellier v. Hinds*, 57 Tex. 392.

³ *Sands v. Davis*, 40 Mich. 14; *Blight v. Rochester*, 7 Wheat. 535; *Kerbough v. Vance*, 6 Baxt. (Tenn.) 110; *Osterhout v. Shoemaker*, 3 Hill, 513; *Kansas Pacific Ry. Co. v. Dunmeyer*, 24 Kan. 725; *Grosholz v. Newman*, 21 Wall. 481; *Winlock v. Hardy*, 4 Litt. 272; *Averill v. Wilson*, 4 Barb. 180; *Huntington v. Pritchard*, 11 Smedes & M. 327; *Doe d. Worsley v. Johnson*, 5 Jones, 72; *Society etc. v. Pawlet*, 4 Peters, 480; *Watkins v. Holman*, 16 Peters, 25; *Gwinn v. Smith*, 55 Ga. 145; *Riddle v. Murphy*, 7 Serg. & R. 235; *Owen v. Robbins*, 19 Ill. 545. See *Campau v. Campau*, 37 Mich. 245; *Lang v. Wilkinson*, 57 Ala. 259.

other adverse claim that originated before his purchase.¹ If a person having title, but no patent, to two lots purchased from the State, conveys them by absolute deed to A, and subsequently he also executes two mortgages on these, and a third lot which he owned, to A, the latter's grantee is not estopped by the acceptance by his grantor of the mortgage of the three lots from asserting ownership of the two under the deed absolute in form.² But if one is in possession of a mill upon a canal, and his title is founded upon a deed made to him under an order of court, and binding him to repair the canal, he cannot free himself from this duty, upon the ground that the order of court was defective, and that hence no title passed by the deed.³

§ 1284. Right under which party holds.—Where both parties in ejectment claim under the same right, the plaintiff is not compelled to trace his title further back than to the person holding that right. The defendant in such case must show the adverse right, if it exists.⁴ Be-

¹ *Sands v. Davis*, 40 Mich. 14.

² *Grosholz v. Newman*, 21 Wall. 481.

³ *Inhabitants of Woburn v. Henshaw*, 101 Mass. 193; 3 Am. Rep. 333. To estop a party by a recital he must be competent to contract: *Jackson v. Vanderheyden*, 17 Johns. 167; 8 Am. Dec. 378; *Bank of America v. Banks*, 101 U. S. 240. Where the members of a partnership execute a deed of trust containing recitals recognizing the validity of a prior deed of trust executed by one member of the firm, the firm and its privies are estopped to deny the validity of the prior deed: *Schwab Clothing Co. v. Claunch* (Tex. Civ. App., Feb. 20, 1895), 29 S. W. Rep. 622. Where land is conveyed to a partnership by a deed reciting that the partnership consists of two named persons, and one of such persons executes a trust deed reciting that the firm is composed of said two persons, he is estopped from asserting, as against the mortgagee, that he constituted the firm: *Willis v. Lockett* (Tex. Civ. App., March 7, 1894), 26 S. W. Rep. 419.

⁴ *Riddle v. Murphy*, 7 Serg. & R. 235. See *Brock v. Yongue*, 4 Ala. 584; *Ketchum v. Schicketanz*, 73 Ind. 137; *Huntington v. Pritchard*, 11 Smedes & M. 327; *Lang v. Wilkinson*, 57 Ala. 259; *Pollard v. Cocke*, 19 Ala. 188; *Schwallback v. Chicago etc. Ry. Co.*, 69 Wis. 292; 2 Am. St. Rep. 740; *Ellis v. Jeans*, 7 Cal. 409; *McClain v. Gregg*, 2 A. K. Marsh. 454; *Bradford v. Urquhart*, 8 La. 234; 28 Am. Dec. 137; *Royston v. Wear*, 3 Head, 8; *Gilliam v. Bird*, 8 Ired. L. 280; 49 Am. Dec. 379; *Den d. Murphy v. Barnett*, 2 Murph. 251; *Den d. Ives v. Sawyer*, 4 Dev. & B.

tween a judgment creditor and his debtor no privity exists.¹ If the only ground on which a party in possession defends is, that one of the grantors in the series of deeds had no title, he is bound by the recitals of the deed.² "It is too limited a view of the effect of such an estoppel," said the court, "to confine its operation to those only who claim an interest through the deed. A person in possession, sustaining his possession by no other title than a denial that a former owner has parted with his right, is not a stranger; he becomes privy in estate to him whose title he maintains, and is concluded by what destroys it in his hands; for, if title can be traced by B to A, and B can fasten upon A the incapacity of asserting his right, in consequence of his admission that he has conveyed to B, it is not just that a stranger standing on A's claims only, and relying on no superior right, should be permitted to contest the existence of a fact which those interested have settled. The law, therefore, wisely attaches the disability of A to all who maintain

51; *Shotwell v. Harrison*, 22 Mich. 410; *Doe v. Dugan*, 8 Ohio, 87; 31 Am. Dec. 432. As a general rule, a person purchasing land subject to a mortgage is estopped from controverting the execution and validity of the mortgage: *Johnson v. Thompson*, 129 Mass. 398; *Freeman v. Auld*, 44 N. Y. 50; *Rigg v. Cook*, 4 Gilm. 336; 46 Am. Dec. 462; *Wanzer v. Blanchard*, 3 Mich. 11; *Cooper v. Bigly*, 13 Mich. 463; *Miller v. Thompson*, 34 Mich. 10; *Holmes v. Ferguson*, 1 Or. 220; *Crooks v. Douglass*, 56 Pa. St. 51; *Brinsmade v. Hurst*, 3 Duer, 206; *Root v. Wright*, 21 Hun, 344. But if the deed does not purport to convey the entire title, or the interest conveyed is left in uncertainty, the rule of estoppel does not apply: *Campau v. Campau*, 37 Mich. 245. A deed of warranty made by one who afterward acquires a patent from the government estops the grantor, and all those subsequently asserting title through him: *Shotwell v. Harrison*, 22 Mich. 410. The estoppel is also binding on the heirs of the grantor when it would bind the grantor himself: *Fairbanks v. Williamson*, 7 Greenl. 96; *White v. Brocaw*, 14 Ohio St. 339; *Upshaw v. McBride*, 10 B. Mon. 202; *Simmons v. Logan*, 1 Harr. (Del.) 110; *Bell v. Adams*, 81 N. C. 118; *Tobey v. City of Taunton*, 119 Mass. 404. Where title is claimed by both parties to an action in the same person, neither is required to show title in him: *Finch v. Ullman*, 105 Mo. 255; 24 Am. St. Rep. 383.

¹ *Waters' Appeal*, 35 Pa. St. 523; 78 Am. Dec. 354.

² *Kinsman v. Loomis*, 11 Ohio, 475.

his title, and permits such estoppels to be used, not merely defensively, but to sustain actions of ejectment.”¹

§ 1285. Paramount title.—If a grantee does not set up a paramount title, the widow of the grantor will be entitled to dower.² But the grantee can set up the title of a third person as paramount.³ While the grantee in a deed-poll may be estopped by admissions intended for him,⁴ the general rule is that the grantor only is estopped.⁵ In a deed demising, releasing, and quitclaiming all the grantor's right, estate, title, and demand to a piece of land, with a *habendum* to the grantee, his heirs and assigns, “so that neither I, nor my heirs or assigns, shall hereafter claim or demand any right or title to the premises, or any part thereof, but they, and every one of them, shall, by these presents, be excluded and forever debarred,” the grantor is not estopped from setting up an after-acquired title to the land conveyed.⁶

§ 1285 a. Estoppel to assert homestead—After-acquired title.—Where the statute provides that the homestead of a married person cannot be encumbered except

¹ *Kinsman v. Loomis*, 11 Ohio, 475.

² *Kimball v. Kimball*, 2 Greenl. 226; *Gayle v. Price*, 5 Rich. 525; *Wedge v. Moore*, 6 Cush. 8; *Dashiel v. Collier*, 4 Marsh. J. J. 601.

³ *Campbell v. Knights*, 24 Me. 332; 45 Am. Dec. 107; *Sparrow v. Kingman*, 1 Comst. 242; *Gammon v. Freeman*, 31 Me. 243; *Foster v. Dwinel*, 49 Me. 44. Some of the early cases held otherwise: *Bowne v. Potter*, 17 Wend. 164; *Bancroft v. White*, 1 Caines, 185; *Sherwood v. Vandenburg*, 2 Hill, 303; *Hains v. Gardner*, 10 Me. 383.

⁴ *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; 13 Am. Rep. 556.

⁵ *Winlock v. Hardy*, 4 Litt. 272; *Gardner v. Greene*, 5 R. I. 104; *Great Falls Co. v. Worster*, 15 N. H. 414; *Sparrow v. Kingman*, 1 Comst. 242. See further, on the extent to which a grantee is bound, *Haynes v. Stevens*, 11 N. H. 28; *Hardy v. Nelson*, 27 Me. 525; *Brown v. Staples*, 28 Me. 497; 48 Am. Dec. 504; *Coakley v. Perry*, 3 Ohio St. 344; *Ward v. McIntosh*, 12 Ohio St. 233; *Addison v. Crow*, 5 Dana, 271; *Jackson v. Carver*, 4 Peters, 1; *Baldwin v. Thompson*, 15 Iowa, 504; *Crane v. Morris*, 6 Peters, 598; *Cutter v. Waddingham*, 33 Mo. 269; *Denn v. Cornell*, 3 Johns. Cas. 174; *Averill v. Wilson*, 4 Barb. 180; *Merryman v. Bourne*, 9 Wall. 592.

⁶ *Holbrook v. Debo*, 99 Ill. 372.

by the joint act of husband and wife, a mortgage executed by the husband alone is void and inoperative in its inception, and does not become valid by the premises subsequently losing their character as a homestead, and the husband's acquirement of them by a decree of divorce which assigns it to him, and he is not estopped from denying the validity of the mortgage in an action of foreclosure.¹ Where the deed of a married woman is void, by reason of defects in the acknowledgment, she is not estopped from claiming the land.² At common law, where a wife has executed a deed conveying an entire tract of land, of which she owns only an undivided half, and she subsequently acquires the other half by inheritance, she is not estopped from asserting title to it.³

§ 1286. **Fraud.**—Although a beneficiary may claim under a trust deed, he is not estopped from attacking it as fraudulent in part.⁴ A deed of land sold at execution sale, describing the land sold "as all that tract of land set off to defendant as a homestead," does not estop the purchaser from disputing the validity of an assignment of homestead to the former owner.⁵ A grantor possessing full knowledge of the facts will not be permitted to testify that the warranty of title made by him was fraudulent and void.⁶

§ 1287. **Competency to contract.**—A person who cannot bind himself by contract naturally, cannot be estopped by anything contained in an instrument which

¹ *Powell v. Pattison*, 100 Cal. 236. But a judgment upon the note may be rendered in the action: *Id.*

² *Stone v. Sledge* (Tex. Civ. App., Jan. 3, 1894), 24 S. W. Rep. 697.

³ *Wadkins v. Watson*, 86 Tex. 194.

⁴ *Haliday v. Croom*, 9 Lea (Tenn.), 349.

⁵ *Carrigan v. Bozeman*, 13 S. O. 376.

⁶ *Fredericks v. Davis*, 3 Mont. 251. Where an action is brought to restrain a person from placing a house upon land contiguous to that conveyed by him to plaintiff, alleging that the deed recited that such contiguous property was dedicated to the public use as a street, the defendant may plead that the recital was inserted by mistake: *Long v. Cruger*, 9 Tex. Civ. App. 208; 28 S. W. Rep. 568.

purports to be a contract. An infant is not estopped by his deed made during infancy.¹ At common law, a married woman is not estopped by her covenants.² But in California, it has been held that a married woman who assumes her maiden name after a decree of divorce which is void, and who lives apart from her husband, acting as and representing herself to be a *feme sole*, can execute a deed of her separate real estate, and acknowledge it as an unmarried woman.³

§ 1288. **Tenants in common.**—In California, the question as to the right of one tenant in common to assail the common title, has received some consideration. In one case it is declared that one tenant in common who enters and remains in possession as such cannot assail the common title or question its validity so as to affect his cotenant.⁴ In another, a tenant in common was allowed to contest the validity of the common title, by using for the protection of his possession an outstanding title which he had purchased.⁵ Still later, the court attempted to harmonize these apparently conflicting decisions by the drawing of a distinction between them; that is, that in the first case the tenant assailing the common title, entered and remained in possession as such tenant, while in the second, it did not appear that the tenant who assailed the

¹ Cook v. Toumbs, 36 Miss. 685. See America Bank v. Banks, 101 U. S. 240; Jackson v. Vanderheyden, 17 Johns. 167; 8 Am. Dec. 378.

² Strawn v. Strawn, 50 Ill. 33; Lowell v. Daniells, 2 Gray, 161; 61 Am. Dec. 448; Jackson v. Vanderheyden, 17 Johns. 167; 8 Am. Dec. 378; Gonzales v. Hukil, 49 Ala. 260; 20 Am. Rep. 282; Sparrow v. Kingman, 1 Comst. 242; McLeery v. McLeery, 65 Me. 172; 20 Am. Rep. 683; Wight v. Shaw, 5 Cush. 56; Barker v. Circle, 50 Mo. 258; Wood v. Terry, 30 Ark. 385; Bank of America v. Banks, 101 U. S. 240; Patterson v. Lawrence, 90 Ill. 612; Goodenough v. Fellows, 53 Vt. 102; Preston v. Evans, 56 Md. 476; Trentman v. Eldridge, 98 Ind. 525. But see Massie v. Sebastian, 4 Bibb. 433; Dukes v. Spangler, 35 Ohio St. 119; Hill v. West, 8 Ohio, 222; 31 Am. Dec. 442; Cowles v. Marks, 53 Ala. 490; Merriam v. Boston R. R. Co., 117 Mass. 241; Fogg v. Yeatman, 6 Lea (Tenn.), 575; Jones v. Reese, 65 Ala. 134.

³ Reis v. Lawrence, 63 Cal. 129; 49 Am. Rep. 83.

⁴ Bornheimer v. Baldwin, 42 Cal. 27.

⁵ Lawrence v. Webster, 44 Cal. 385.

common title was in possession or had acknowledged the existence of the relation of cotenancy.¹ Where a deed has been executed to two persons, one of the grantees, by acting under it in executing conveyances for parts of the land, estops himself from assailing the title of the other grantee. He is not permitted to set up a title paramount to that under which his cograntee claims.²

§ 1289. **Possessory title.**—The same rule applies to a case where a person having a possessory title to land dies in possession, leaving heirs who succeed to such possession. If one of the heirs has obtained the exclusive possession of the land, he will not be allowed to set up a title acquired from the owner for the purpose of defeating a recovery by his co-heirs of their proportional shares. He must, if he desires to avail himself of such title, first surrender possession to his co-heirs, and then he may institute an action of ejectment.³ The court admitted that a person in possession may purchase an outstanding title for the purpose of fortifying his own, provided that the possession was not taken under circumstances which prevented him from assailing the title of the party claiming. "What I contend for," said Mr. Chief Justice Nelson, "is that one of the co-heirs having derived his possession from the common ancestor, as well as through his co-heirs, is disabled while standing upon this possession from disputing their title. I do not deny but the title thus attempted to be set up may be valid, nor but that the party may avail himself of it after surrendering this possession. In a court of law he clearly could. There might be considerations existing between the co-heirs that would lead a court of equity to declare the purchase to have been made for the benefit of all,

¹ *Olney v. Sawyer*, 54 Cal. 379. And see *Thomason v. Dayton*, 40 Ohio St. 63. As to estoppel arising from conflicting surveys to lot held by tenants in common, see *Glasgow v. Baker*, 72 Mo. 441.

² *Funk v. Newcomer*, 10 Md. 301. See *Braintree v. Battles*, 6 Vt. 395.

³ *Phelan v. Kelley*, 25 Wend. 390.

upon proper terms.”¹ Mr. Justice Harris on this point says, by way of illustration: “Thus, where one enters under a contract of purchase, or a license, or a lease, or as a tenant in common, he is held to be estopped from controverting the title under which he entered. The qualification of the general principle stated has its foundation in the law of estoppel, which will not allow a man to do what in honesty and good conscience he ought not to do.”²

§ 1290. **Descent.**—This rule applies to all cases where a tenancy in common is created, whether by purchase or descent. If, for instance, children take by descent as tenants in common, one of them cannot claim that the common ancestor held no title, and that his possession is based on his individual right, and not on his right as a tenant in common.³ But if a tenant desires to participate in the benefit of a purchase made by his cotenant, he must elect within a reasonable time to bear his proportion of the outlay.⁴

§ 1291. **Interests acquired by cotenant.**—If tenants in common acquire their interests at different times, and there is no agreement between them as to the title, one of them can purchase an outstanding superior title in order to protect his own. He is not estopped from asserting this title, and it does not inure to the benefit of the other tenant, notwithstanding an offer on his part to pay his proportionate part of the money spent in securing it.⁵ The rule is, however, where the cotenants derive their title from the same source, that one cannot purchase an outstanding title and set it up against his cotenants, with-

¹ *Phelan v. Kelley*, 25 Wend. 393.

² *In Burhans v. Van Zandt*, 7 Barb. 91, 105.

³ *Jackson v. Streeter*, 5 Cowen, 529.

⁴ *Buchanan v. King*, 22 Gratt. 414; *Lea v. Fox*, 6 Dana, 177; *Mandeville v. Solomon*, 39 Cal. 133; *Potter v. Herring*, 57 Mo. 184; *Brittin v. Handy*, 20 Ark. 403; 73 Am. Dec. 497.

⁵ *Roberts v. Thorn*, 25 Tex. 736; 78 Am. Dec. 552.

out affording them the opportunity of contributing their ratable shares to obtain the benefit of the purchase.¹

§ 1292. **Widow of intestate.**—A widow of an intestate occupies a fiduciary possession toward the other heirs which will preclude her from buying in an outstanding title, or a mortgage upon the land for her individual benefit. Her possession in such a case, as dowress and guardian of the minor heirs, is as tenant in common with all the heirs.² Hence, if she pays off a mortgage, has it

¹ *Titsworth v. Stout*, 49 Ill. 78; 95 Am. Dec. 577; *Keller v. Auble*, 58 Pa. St. 410; 98 Am. Dec. 297; *Rothwell v. Dewess*, 2 Black, 613; *Jones v. Stanton*, 11 Mo. 433; *Sullivan v. McLenans*, 2 Clarke, 442; 65 Am. Dec. 780; *Knolls v. Barnhart*, 71 N. Y. 474; *Brown v. Homan*, 1 Neb. 448; *Venable v. Beauchamp*, 3 Dana, 324; 28 Am. Dec. 74; *Van Horne v. Fonda*, 5 Johns. Ch. 407; *Boskowitz v. Davis*, 12 Nev. 446; *Picot v. Page*, 26 Mo. 398; *Gossom v. Donaldson*, 18 Mon. B. 230; 68 Am. Dec. 723; *Weaver v. Wible*, 25 Pa. St. 270; 64 Am. Dec. 696; *Smith v. Osborne*, 86 Ill. 606; *Oliver v. Hedderly*, 32 Minn. 455; *Swinburne v. Swinburne*, 28 N. Y. 568. The language of the chancellor in *Van Horne v. Fonda*, 5 Johns. Ch. 389, 407, on this point is frequently cited: "I will not say, however, that one tenant in common may not, in any case, purchase in an outstanding title for his exclusive benefit. But when two devisees are in possession under an imperfect title, derived from their common ancestor, there would seem, naturally and equitably, to arise an obligation between them, resulting from their joint claim and community of interests, that one of them should not affect the claim to the prejudice of the other. It is like an expense laid out upon a common subject, by one of the owners, in which case all are entitled to the common benefit, on bearing a due proportion of the expense. It is not consistent with good faith, nor with the duty which the connection of the parties as claimants of a common subject created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim, which the relationship of the parties, as joint devisees, created. Community of interest produces a community of duty, and there is no real difference, on the ground of policy and justice, whether one cotenant buys up an outstanding encumbrance or an adverse title, to disseise and expel his cotenant. It cannot be tolerated when applied to a common subject in which the parties had equal concern, and which created a mutual obligation to deal candidly and benevolently with each other, and to cause no harm to their joint interest."

² *Knolls v. Barnhart*, 71 N. Y. 474.

assigned to her, and subsequently forecloses and buys the property at the sale in her own name, and executes a deed to one of the heirs in occupation with her, her title is not fortified by the transfer. The interests of the other heirs are not cut off by these proceedings.¹

§ 1293. **Contract of sale.**—Two parties held land as tenants in common, and one of them agreed to sell his interest to a third person. The cotenants agreed upon a partition, and executed deeds of partition. The one who had agreed to sell his interest executed a deed to his vendee in compliance with the previous contract. The court held that in equity the vendee stood in his vendor's place, subject to the same liability as warrantor to the other former cotenant, against whom he could not set up an adverse title to the premises.² "As a general rule, one tenant in common, before partition, is not permitted to purchase in a superior outstanding claim for his own exclusive benefit, and much less to use it for the expulsion of his cotenant. Such a purchase is considered, in equity, as inuring to the benefit of both, and the purchaser is entitled to contribution. This principle arises from the privity subsisting between parties having a common possession of the same land and a common interest in the safety of the possession of each; and it only inculcates that good faith

¹ *Knolls v. Barnhart*, 71 N. Y. 474. A father who owned land conveyed it with his wife to their son in consideration of the latter agreeing to support them during life, but the deed was subsequently declared to be void as to the father's creditors, and the land was sold to pay his debts. Before a deed was executed under the decree the father died intestate, but after its execution the grantees and the widow partitioned the land by agreement and deeds whereby one-third was conveyed to her. It was held that she was not estopped from claiming title and possession of such third as against the son, who had performed, and was willing to perform, the conditions of his agreement: *Miller v. Miller*, 140 Ind. 174; 39 N. E. Rep. 547.

² *Venable v. Beauchamp*, 3 Dana, 321; 28 Am. Dec. 74. Where a person agrees to sell certain land, in case he acquires title, and divide the proceeds with another, the agreement is not such a conveyance as will operate as an estoppel when he subsequently obtains title: *Olephant v. Burns*, 146 N. Y. 218.

which seems appropriate to their relative position." "The vendee," said the court, "is, in equity, as much bound to all the legally inherent conditions and consequences of the partition as if he had been a formal and legal party to it. One of these inherent conditions or consequences is the implied warranty, which at least stops him from evicting the other tenant by adverse title, and binds him to repartition in case of such eviction by a stranger."¹ If a person in possession of land under a parol contract builds a house upon it, and dies in possession, the widow, who obtains possession under him, cannot purchase the title for her benefit to the exclusion of his children.²

§ 1294. **Action of ejectment.**—In an action of ejectment the plaintiff must rely on legal title. He cannot have the benefit of a purchase made by the defendant without resorting to a court of equity. There all matters connected with the transaction may be inquired into, and the expense of the purchase be equitably apportioned among the different parties, and if the purchase inured to the benefit of the plaintiff in the ejectment suit, the title or his proper portion of it may be transferred to him.

¹ *Venable v. Beauchamp*, 3 Dana, 321, 324, 327; 28 Am. Dec. 74.

² *Weaver v. Wible*, 25 Pa. St. 270; 64 Am. Dec. 696. Mr. Justice Lewis, in delivering the opinion of the court, after referring to the rules binding tenants in common, said: "There can be no doubt that a widow who comes into possession by and through her husband, who is entitled to dower out of the estate, and who, by reason of her right to administration, has opportunities to suppress or destroy the title papers, is bound by these rules of justice and morality. The law will not permit her to trample upon the rights of her helpless children. The creditors of her husband have an equal claim upon her in this respect. Indeed, they stand upon higher ground than the heirs, because they have given value, and the heirs have not. In this case Abraham Weaver was in possession under a contract with Horbach for the lot. He built a brick house upon it, and died in possession. The law casts the inheritance upon the children at the death of their father, and the widow who came into possession through him, and remained there under his title, had no right to repudiate the contract and purchase the property for herself. If she succeeds in her object in this case, she gets the improvements without paying for them."

In an action of law, however, these various matters cannot be determined and settled.¹

§ 1295. **Acquisition of title at execution sale.**—If land is jointly held by a number of persons, one of them, it is said in a case in Pennsylvania, cannot set up a title purchased by him at a sheriff's sale on an execution against them. He will hold at most, according to this decision, the former interests of his cotenants as a trustee for them.² But the view taken by the court of Pennsylvania is not generally recognized as the correct rule. In a case in North Carolina, Mr. Chief Justice Ruffin, in delivering the opinion of the court, said: "The court is not aware of any decision that a tenant in common cannot, nor of any reason why he may not, purchase the interest of his fellow. Their estates are legal and several, the only union between them being that of possession. They do not hold in trust for each other. The rule is only that the possession of one *eo nomine* is the possession of the other, and that such a possession will, therefore, never bar his companion. But the relation between them is not such as to forbid one from purchasing from the other, upon the principle on which a court of equity regards with jealousy the dealings between persons who stand toward each other in a fiduciary capacity. These estates are so completely severed, that at common law, that of the one could not be passed to the other by release, but required a feoffment and livery of seisin. Why, then, should not one purchase the several estate of the other upon execution? There is nothing in the policy of the law against it. There might be a disadvantage to the debtor by judgment, if the law excluded his companion from bidding, as he would probably give more than any other person. There may, indeed, be dealings between the parties themselves, upon which an accountability had arisen, as upon the receipt of too much of the profits by one, or outlays

¹ Lawrence v. Webster, 44 Cal. 385.

² Gibson v. Winslow, 46 Pa. St. 380; 84 Am. Dec. 552.

in common improvements or the like, which would render it wrong, as an undue advantage in one, to bring the share of the other to sale; upon which the court might hold the sheriff's deed to be only a security for the true balance that might be found upon a general account. But there is no principle of law which is violated by such a purchase; nor any principle of equity, either in the case declared, and upon the evidence, properly declared in the decree; that is to say, that the defendant's ancestor had no funds of the plaintiff in his hands applicable to the debt of which the plaintiff owed one-half; and that the purchase was made with the party's own money. If a third person have a judgment and execution against one of two tenants in common, his interest may unquestionably be sold; and the sale is valid against him, both in law and in equity. His share is the subject of execution. And we cannot imagine a reason why his companion may not fairly, in such a case, be a bidder. So, if one tenant in common have a judgment against another, he may sell the share of the debtor. If he may not, while others may, it will amount to the loss of his debt; for the judgment of the companion is not a specific encumbrance or an equitable lien, which would follow the land in the hands of a purchaser under another execution as a claim for outlays in improvements might. This case is somewhat different from either of those supposed, inasmuch as the execution was against both the tenants in common for a joint debt. But we cannot conceive that it calls for a different principle. Although the debt was joint, so that each was bound for the whole, yet as between the parties, half the debt was the separate debt of each, regarding them merely as tenants in common. Suppose a judgment against heirs for the debt of the ancestor, can it be argued that one heir, in order to save his own estate, is bound to pay the whole debt, and then wait to sue his coheir for contribution, and to have partition also made before he could have satisfaction? We think he could pay his own proportion of the debt; and then that the

proportion of the other heir might be raised by the sale of his share *eo nomine*, at which the heir who had paid his part might be a bidder. If so, his purchase of the whole undivided land must also be good; for, in effect, it is the same as paying his part of the debt first, and then buying his companion's share for his default. It is a very common case that one brother buys at sheriff's sale the undivided estate of another brother in descended lands, either for the debt of the ancestor, or that of the brother himself, contracted after the father's death; and we believe the legality of such a purchase has never been questioned. It is a legal, several interest, and as such subject to execution; and the policy of the law is to invite bidders, and exclude none but those whose *duty* it is, in a legal sense, to make the things exposed to sale bring the best price. They are excluded because the interest of a purchaser is to get the thing at the least price, and is, therefore, directly opposed to this duty. But it is not the duty of one heir, or of one tenant in common, as such, to pay the debts of another heir or tenant in common; nor to aid in the sale of his estate by getting the best price for it; nor to refrain from buying it, to his own disadvantage—more than it is the duty of any other person wholly unconnected with them.”¹

§ 1296. **Sale under trust deed.**—Where an owner of land executes a deed of trust, and subsequently conveys an undivided half interest in the land to another, the interests of these two parties do not accrue under the same instrument, act of the parties, or by operation of law. If they have no understanding or agreement with each other, their relations are not such as to prevent the purchaser of the undivided half interest from purchasing the estate of his cotenant at a sale under a power contained in the trust deed.² “He did not purchase,” as said by Mr. Justice McAllister, “an outstanding title or encumbrance ad-

¹ *Baird v. Baird's Heirs*, 1 Dev. & B. Eq. 524, 534; 31 Am. Dec. 399.

² *Burr v. Mueller*, 65 Ill. 258.

verse to or affecting the common title of his cotenant and himself, but he purchased the several estate of his cotenant under a power and in the mode in which such cotenant authorized the same to be sold in case he failed to pay the notes he had given for the purchase money.”¹

§ 1297. **Comments.**—One tenant in common can purchase the interest of his cotenant; or the tenants in common can sell the whole interest, and subsequently one of the former tenants can take title from the purchaser. At an execution sale, what more is done? The interest of one tenant, or the interest of all the tenants, is offered for sale. True, it is not a voluntary sale, but that concerns only the judgment debtor. If his interest is offered for sale, whether by his consent or without, why should anyone, who is not under some duty of seeing that the highest price for the property to be sold should be obtained, be prevented from purchasing? If the interest of the tenant alone or of any number of tenants, excluding the purchaser, is offered for sale, there can be little doubt that the remaining tenant whose interest in the property is not affected at the sale may become a purchaser at the execution sale. The only difficulty, it seems to us, that can arise is where the joint interest of all the tenants is sold for a joint debt. It might be said in such a case that as it was in part the fault of the tenant that the judgment against all was obtained, he should not, in good faith, be permitted to take advantage of his own default and be allowed to purchase at the sale on execution, and secure a title which would be valid against his cotenants. It might be contended that it was his duty to remove the debt or charge upon which the judgment was obtained, and that his purchase at the execution sale was only a discharge of the indebtedness. His position might be said to be similar to that of a tenant in common who purchases the title at a tax

¹ In delivering the opinion of the court in *Burr v. Mueller*, 65 Ill. 258. 262. See, also, to the effect that a tenant may purchase at an execution sale, *Brittin v. Handy*, 20 Ark. 381; 73 Am. Dec. 497; *Gunter v. Laffan*, 6 Cal. 588.

sale. There is, it must be confessed, much force in this view, inasmuch as the purchaser would have the right to exact contribution from his cotenants in the same manner and to the same extent as if he had discharged any other outstanding encumbrance. But we are of the opinion that the same rule would apply to a sale of the joint interest upon a judgment for a joint debt as would prevail were the interest of one tenant only offered for sale. We do not see how such a rule can injure the other cotenants. The purchaser secures the title at the sale on execution only because he is the highest bidder. The property sells for no less because he is authorized to purchase. He does not conduct the sale. He is as much interested as his cotenants in having the property sold for as large a price as possible. Or if not interested to that degree, he occupies, so far as the interests of his cotenants are concerned, no more antagonistic position to them than a stranger would occupy. We are unable to see, therefore, that any policy of the law is violated by allowing a tenant to purchase at execution sale.

§ 1298. **Title accruing at different times.**—The rule that one cotenant cannot acquire an outstanding title for his exclusive benefit is founded on the fact that as the cotenants acquire their interests at the same time, the confidential relation that exists between them forbids that one should acquire a benefit to the exclusion of the others. Hence, generally, where this reason does not exist, where the cotenants acquire their interests at different times, a modification of this rule is recognized, and in such case, one tenant may acquire an outstanding title, and hold it for his exclusive benefit. He is not compelled to share with his cotenants whatever advantage he may have secured by his purchase.¹ Where a sale under foreclosure proceedings purports to be for the whole prem-

¹ *Rippetoe v. Dwyer*, 49 Tex. 498; *Roberts v. Thorn*, 25 Tex. 736; 78 Am. Dec. 552; *King v. Rowan*, 10 Heisk. 675; *Brittin v. Handy*, 20 Ark. 381; 73 Am. Dec. 497; *Wright v. Sperry*, 21 Wis. 331; *Frentz v. Klotsch*, 28 Wis. 312; *Keech v. Sandford*, 1 Lead. Cas. Eq., p. 70, n.

ises, a purchaser thereat, who in fact acquires title to an undivided part only, and becomes in law a tenant with the mortgagor, has the right to purchase an outstanding title under a tax deed of the whole, and thus take title to the remainder. In such a case the title of a purchaser under the foreclosure sale is adverse to the title of the mortgagor.¹ Mr. Justice Downer referred to the general rule that if one tenant in common purchases an outstanding title, he holds it for the common benefit of all, and said that this doctrine applies only where tenants in common are in the possession of the land, or where one enters in his relation as tenant, so as to cause his possession to be the possession of all the tenants. The justice then proceeded: "During such possession each is under obligation, morally and legally, to protect their common estate, and if anyone expends money in so doing, as in paying taxes, liens thereon, or buying in an adverse title, he has a right of action against his cotenant to recover the share he should have contributed. While he claims as a cotenant, he is presumed, if he buys in an outstanding title, or pays off an encumbrance, to act not only for himself, but for his cotenants. But after one tenant denies the rights of his cotenants, and claims the whole property, such claim being known to them, they have no longer any reason to suppose that in anything he does respecting the land he acts for them; but on the contrary, they know that he claims and intends to act solely for his own benefit. It is then no longer a fraud on their rights for him to buy in an outstanding title, and hold it exclusively for his own benefit. Certainly, it is not unreasonable so to hold, if he may without such outstanding title, by merely entering into possession of and claiming the whole land, acquire by adverse possession a perfect title to the whole, unless his cotenants within twenty years commence an action against him."²

¹ Wright v. Sperry, 21 Wis. 331.

² In Wright v. Sperry, 21 Wis. 331, 338.

§ 1299. Different rule in Illinois.—In Illinois, the principle stated in the preceding section is rejected. In a case in that State, the court referred to some of the authorities cited in the preceding section, but refused to follow them. “We do not find sufficient authority or reason,” said Mr. Justice Sheldon, in delivering the opinion of the court, “to induce us to adopt the qualification of the doctrine, as applied to tenants in common, that their interest should accrue under the same instrument or act of the law. We regard the rule as founded upon the duty which the connection of the parties as claimants of a common subject creates, and not as dependent upon the accidental circumstance whether the relationship of the parties be constituted by the same instrument or act of the parties, or of the law or not.”¹

§ 1300. Comments.—Every rule of law has or should have some just reason on which it is founded. Examining this question, we find that the reason which prevents one cotenant from acquiring an outstanding title to the injury of his cotenants is founded on the principle that the relations existing between them are of that confidential character as to compel each to act for the interests of all. But this confidential relation arises from the fact that they become tenants in common by one act, or under one conveyance. If they occupy the relation of tenants in common from distinct sources of title, we do not see what confidential relations can be said to exist between them. If A and B are tenants in common under distinct sources of title, acquired at different times, and C has an adverse title to the title held by A and B, there is nothing to prevent C from asserting his title against A and B. Or, if he so desires, he may oust A from possession and leave B unmolested. If the title held by A and B should be defective, and C should be declared to be the owner of the property, and on his paramount title should suc-

¹ *Bracken v. Cooper*, 80 Ill. 221, 229. This view was adopted and this language quoted with approval in the later case of *Montague v. Selb*, 106 Ill. 49, 58.

ceed to the possession, we know of no rule of law which in the case of such complete failure of title would forbid either A or B, after eviction, from purchasing for his exclusive benefit the superior title of C. Now, what practical difference can there be, if, instead of an assertion of hostile title by C, one of the tenants in common purchases this title, and succeeds to the rights of C? Manifestly, where one tenant in common owes a duty of good faith to his cotenants, he should not be allowed to assert a hostile title, and he owes this duty when he succeeds to the title or possession at the same time, and under the same instrument. But we fail to see any reason for holding that he is bound in any peculiar duty to his cotenants, with whom he has had no dealings, and to whom he is in law a perfect stranger. Estoppels should not be favored. The doctrine of estoppel should only be applied to cases where any other rule would result in manifest injustice. We think that the rule that one tenant in common cannot set up an adverse title against his cotenants should be limited to cases where the tenancy is created at the same time, and that where the interests of the tenants are acquired at different times or from different sources, no principle of fair dealing or good faith is violated by holding that one tenant may set up an adverse title against his cotenants.

§ 1301. Setting up tax title by tenant in common.—The law does not permit a tenant in common to acquire a tax title for the purpose of defeating the interest of his cotenants. He holds whatever interest he may acquire for their benefit.¹ The same rule has been applied to one

¹ *Flinn v. McKinley*, 44 Iowa, 68; *Choteau v. Jones*, 11 Ill. 300; 50 Am. Dec. 460; *Allen v. Poole*, 54 Miss. 323; *Page v. Webster*, 8 Mich. 263; 77 Am. Dec. 446; *Harrison v. Harrison*, 56 Miss. 174; *Maul v. Rider*, 51 Pa. St. 377; *Davis v. King*, 87 Pa. St. 261; *Fallon v. Chidester*, 46 Iowa, 588; 26 Am. Rep. 164; *Lloyd v. Lynch*, 28 Pa. St. 419; 70 Am. Dec. 137; *Moore v. Woodall*, 40 Ark. 42; *Butler v. Porter*, 13 Mich. 292; *Austin v. Barrett*, 44 Iowa, 488; *Conn v. Conn*, 58 Iowa, 747; *Downer's Administrator v. Smith*, 38 Vt. 464; *Weare v. Van Meter*, 42 Iowa, 128; 20 Am. Rep. 616; *Shell v. Walker*, 54 Iowa, 386; *Davidson v. Wallace*,

who took an assignment of a certificate of sale, and became a tenant in common before he received the tax deed.¹ While a tenant in common is estopped from setting up his tax title, he will have a lien upon the interests of his cotenants for their proportional amount of the taxes paid.²

§ 1302. **Taxes against joint interest.**—Where taxes are levied against the joint interest of the tenants in common, and they all neglect to pay the amount due, one of them in purchasing at a tax sale acquires no title against his cotenants, as his purchase is but another mode of discharging the burden resting on all. As he is in default himself in such a case, his own neglect of duty will not enable him to acquire the title of others. His purchase can give him no greater rights than he would have possessed if he had voluntarily paid the whole amount of taxes before the sale for the delinquency was made.³ In a case in Michigan, it was insisted by counsel that the principle that one tenant in common cannot acquire at a tax sale the interest of his cotenant, was applicable only when this duty was imposed by possession. But Mr. Justice Christiancy, who delivered the opinion of the

53 Miss. 475; *Battin v. Woods*, 27 W. Va. 58; *Minter v. Durham*, 13 Or. 470; *Donnor v. Quartermas*, 90 Ala. 164; 24 Am. St. Rep. 778; *Emeric v. Alvarado*, 90 Cal. 444; *Moss v. Shear*, 25 Cal. 38; 85 Am. Dec. 94; *Christy v. Fisher*, 58 Cal. 256; *Bailey v. Campbell*, 82 Ala. 342; *Johns v. Johns*, 93 Ala. 239; *Pruitt v. Holly*, 73 Ala. 369; *Richards v. Richards*, 75 Mich. 408; *Holterhoff v. Mead*, 36 Minn. 42; *Sorenson v. Davis*, 83 Iowa, 405; *Phipps v. Phipps*, 47 Kan. 328; *Delashmutt v. Parrent*, 39 Kan. 548; *Watkins v. Eaton*, 30 Me. 529; 50 Am. Dec. 637; *Middletown Sav. Bank v. Bacharach*, 46 Conn. 513; *Burgett v. Taliaferro*, 118 Ill. 503; *Sontag v. Bigelow*, 142 Ill. 143; *Lewis v. Ward*, 99 Ill. 525; *Hurley v. Hurley*, 148 Mass. 444; *Clark v. Rainey*, 72 Miss. 151; *Robinson v. Lewis*, 68 Miss. 69; 24 Am. St. Rep. 254; *Jonas v. Flanniken*, 69 Miss. 577; *Cohea v. Hemingway*, 71 Miss. 22; 42 Am. St. Rep. 449; *Tanney v. Tanney*, 159 Pa. St. 277; 39 Am. St. Rep. 678; *Hannig v. Mueller*, 82 Wis. 235; *Newton v. Marshall*, 62 Wis. 8; *Clark v. Lindsey*, 47 Ohio St. 437; *McChesney v. White*, 140 Ill. 330; *English v. Powell*, 119 Ind. 93; *Bender v. Stewart*, 75 Ind. 88. See, also, *Miller v. Mills*, 4 Neb. 362.

¹ *Flinn v. McKinley*, 44 Iowa, 68. See, also, *Tice v. Derby*, 59 Iowa, 314.

² *Moore v. Woodall*, 40 Ark. 42.

³ See *Page v. Webster*, 8 Mich. 263; 77 Am. Dec. 446.

court, said in response that this was not the true ground on which this principle rested. "The duty springs from the ownership. The sale is an entire thing based upon the delinquency in the payment of the taxes for which the sale is made, and the purchaser cannot be allowed to acquire the title of others in the property by a sale based, in part, upon his own default."¹ Taxes levied on the land are an encumbrance created by statute. Payment of taxes is but a discharge of the tenant's duty. By such payment, or by a purchase at a tax sale, the whole land becomes redeemed, and the purchaser has simply the right to demand contribution.²

§ 1303. Repurchase of tax title by tenant in common.

Where a party who is in duty bound to pay the taxes on the land permits it to be sold to a stranger, while this sale may terminate the tenancy as long as such stranger holds the tax title, yet the tenancy has been ended by the wrong of the party in fault, and if he subsequently purchases in the title, the rights of himself and former owners are the same as before the sale. He occupies the same position toward his cotenants that he would have held if the taxes had been paid when due, or if the sale had been made directly to him instead of to another.³

§ 1304. Provision of statute.—In California, the statute in force at the time the case cited in the note came

¹ *Butler v. Porter*, 13 Mich. 292, 302.

² *Downer's Administrator v. Smith*, 38 Vt. 464. In *Allen v. Poole*, 54 Miss. 323, Mr. Chief Justice Simrall, in delivering the opinion of the court, says (p. 334): "The extinguishment of the tax title by conveyances to himself would be esteemed to have been done for the common benefit of the tenants in common; and being an expenditure of money for the benefit of the estate and to disencumber the title, would constitute a charge on the property for his reimbursement. But he would not be permitted in equity to set up such title in opposition to his cotenants, and as paramount. Right is meted out to him when his cotenants of the estate refund to him their aliquot portions of the money expended. That allowance was made in the decree to him. A tenant who relieves the estate of the encumbrance of taxes has a charge upon the land itself as against his cotenants for reimbursement."

³ *Dubois v. Campau*, 24 Mich. 360.

before the court, provided that any deed derived from a sale of real property under the statute should be "conclusive evidence of title, except as against actual fraud or prepayment of taxes," and should entitle the holder to a writ of assistance from the proper court to obtain possession of the property so sold for nonpayment of taxes. One tenant in common bought at a sale for delinquent taxes. The court recognized the general rule that a tenant in common cannot obtain a tax title for the purpose of setting it up against his cotenant, but said that this rule rested upon the doctrine of constructive frauds, and could not apply to a case where, by force of the statute, the fraud must be actual. The court decided that, under the statute referred to, the deed could not be rejected as void, although the court admitted that possibly in equity the purchase would be regarded as a trust, and relief would be administered on that ground, but to entitle a tenant to claim that relief, he should present a case for equitable interference before the court could render him assistance. But on an application to obtain the writ of assistance authorized by the statute, the cotenant, the court decided, could not base a defense upon the invalidity of the deed.¹

§ 1305. Estoppel against him only who ought to have paid.—The reason for refusing to allow one cotenant to set up a title acquired at a tax sale is, that it was his duty to discharge the tax. But where this reason does not exist, the rule itself ought to cease. A party who purchases the undivided interest of one cotenant, and who does not go into possession by the aid of the other tenants, or in recognition of their rights, is not estopped from setting up an adverse claim which he ac-

¹ *Mills v. Tukey*, 22 Cal. 373; 83 Am. Dec. 74. The husband or wife of one tenant in common cannot purchase at a tax sale and hold the interest so purchased: *Busch v. Huston*, 75 Ill. 343; *Rothwell v. Dewees*, 2 Black. 613; *Young v. Adams*, 14 B. Mon. 127; 58 Am. Dec. 654; *Robinson v. Lewis*, 68 Miss. 69; 24 Am. St. Rep. 254; *Burns v. Byrne*, 45 Iowa, 285; *Lee v. Fox*, 6 Dana, 171.

quired before his purchase. He can set up a tax title arising from the default of his grantor.¹

§ 1306. Title acquired before creation of tenancy.—The principles that we have considered in the preceding sections apply to cases only where the tenancy exists at the time of the acquisition of the adverse claim. The confidential relations that exist between the cotenants estop them from asserting an adverse claim against the common title. But, manifestly, this principle can have no application where such adverse title has been acquired before the creation of the tenancy. The privity existing between the tenants not having then commenced, no rule of law will compel one tenant to give his cotenants the benefit of his prior title. He is not estopped from asserting such title.²

§ 1307. Bond for title and deed.—If in the purchase of a tract of land, the land is sold for a certain price per acre, a bond for title being executed which describes the land as so many acres and not by metes and bounds, and afterward the purchaser accepts a deed in which the land is described by metes and bounds without reference to the number of acres, but reciting the entire consideration, the bond, in a dispute as to the quantity of land actually bargained for, will control, and not the deed. The grantee is not estopped by the deed from showing that the number of acres embraced in the deed was not the quantity of land for which he bargained.³ Where a deed conveying an undivided interest declares that it is in lieu of a previous deed conveying a specific portion by metes and bounds, the grantee is estopped from claiming under the previous deed.⁴ He is estopped, also, where a second deed is taken as a substitute for a former one.

¹ *Sands v. Davis*, 40 Mich. 14. See, also, *Blackwood v. Van Vleit*, 30 Mich. 118.

² *Sneed's Heirs v. Atherton*, 6 Dana, 276; 32 Am. Dec. 70.

³ *Frank v. Coltrane*, 61 Miss. 606. See *Kerr v. Kuykendall*, 44 Miss. 137.

⁴ *Emeric v. Alvarado*, 64 Cal. 529; *Chloupek v. Perotka*, 89 Wis. 551; 46 Am. St. Rep. 858.

§ 1308. **Deed obtained by fraud.**—Where the grantee in a deed obtains it by fraud upon his grantor, and does not have it recorded, but subsequently sells the land to a *bona fide* purchaser for a valuable consideration, who has no knowledge of the fraud, and such purchaser, instead of taking a deed from the grantee in the fraudulent deed, takes a new deed from the original grantor, who, with knowledge of the fraud practiced upon him, cancels the unrecorded deed, the second deed, though signed and sealed in the presence of but one witness, and not acknowledged, passes the title of the original grantor. The latter, on the principle that where a loss must fall on one of two innocent parties, it must be borne by the one who is the occasion of the loss, will be estopped from disputing the title or claim of such *bona fide* purchaser to the land. The court, after alluding to the rule that a grantor voluntarily executing a deed, though induced to do so by fraud, can avoid it only as against the party who committed the fraud, or against a purchaser with notice, and not against one who took a title apparently valid from one having capacity to convey, declared that a different rule would not prevail where the grantor cancels the unrecorded deed, and voluntarily executes a new one to an innocent purchaser.¹ If an attorney drafts a deed in which the proper person is named as grantee, and subsequently fraudulently substitutes another deed for the grantor's signature, in which latter deed the attorney's name is written as grantee, and the grantor signs this deed without inspection, under the belief that it is the original deed which had been examined, the grantor is estopped from attacking the validity of the deed to the attorney, after the latter has conveyed the land for value to an innocent purchaser.²

§ 1309. **Deed of composition.**—If money is paid to one creditor to induce him to sign a deed of composition,

¹ *Wilson v. Hicks*, 40 Ohio St. 418, 429.

² *McNeil v. Jordan*, 28 Kan. 7.

another creditor who signs the deed without knowledge of such payment is not precluded from maintaining an action on his debt.¹ "In transactions between a debtor and his creditors, which result in a deed of composition, the utmost good faith is required. The debtor professes to deal upon equal terms with all the creditors who enter into the settlement, and they are supposed to stand in the same situation. This, then, being the principle upon which the compromise rests, it would seem to follow that the debtor, when he induces one creditor to assent to the arrangement by giving him a secret preference over other creditors, is guilty of a fraud in obtaining the composition deed, because it must be presumed that such other creditors, had they known of such secret preference, would not have assented to the composition. And it may be stated, as a general rule, that an agreement cannot be made the subject of an action, or set up as a defense, if it can be impeached on the ground of dishonesty, or as being against public policy,"² Judge Story, speaking of these secret bargains, says: "The purport of a composition or trust deed, in cases of insolvency, usually is, that the property of the debtor shall be assigned to trustees, and shall be collected and distributed by them among the creditors according to the order and terms prescribed in the deed itself. And, in consideration of the assignment, the creditors who become parties generally agree to release all their debts beyond what the funds will satisfy. Now it is obvious that in all transactions of this sort the utmost good faith is required; and the very circumstance that other creditors of known reputation and standing have already become parties to the deed will operate as a strong inducement to others to act in the same way. But if the signatures of such prior creditors have been procured by secret arrangements with them, more favorable to them than the general terms of the composition deed warrant, those creditors really act, as has been said by a very sig-

¹ *Partridge v. Messer*, 14 Gray, 180, and cases cited.

² *Davison, J.*, in *Kahn v. Gumberts*, 9 Ind. 430, 432.

nificant, though homely, figure, as decoy ducks upon the rest. They hold out false colors to draw in others to their loss or ruin. In modern times, the doctrine has been acted upon in courts of law, as it has long been in courts of equity, that such secret arrangements are utterly void, and ought not to be enforced even against the assenting debtor or his sureties or his friends. There is great wisdom and deep policy in the doctrine; and it is found in the best of all protective policy, that which acts by way of precaution rather than by mere remedial justice; for it has a strong tendency to suppress all frauds upon the general creditors by making the cunning contrivers the victims of their own illicit and clandestine agreements. The relief is granted, not for the sake of the debtor, for no deceit or oppression may have been practiced upon him, but for the sake of honest and humane and unsuspecting creditors. And hence the relief is granted equally, whether the debtor has been induced to agree to the secret bargain by the threats or oppression of the favored creditors, or whether he has been a mere volunteer, offering his services and aiding in the intended deception. Such secret bargains are not only deemed incapable of being enforced or confirmed, but even money paid under them is recoverable back, as it has been obtained against the clear principles of public policy. And it is wholly immaterial whether such secret bargains give to the favored creditors a larger sum or an additional security or advantage, or only misrepresent some important fact; for the effect upon other creditors is precisely the same in each of these cases. They are misled into an act to which they might not otherwise have assented.”¹

§ 1310. Estoppel limited by intention.—Clauses contained in deeds are to be so construed as to carry out the intention of the parties, whenever such intention can be ascertained. When it is sought to fasten an estoppel upon a party to a conveyance, by virtue of some clause or statement contained in it, it is proper to inquire what was

¹ 1 Story's Eq. Juris., §§ 378, 379.

meant at the time by the language employed, and when the intention can be determined, the deed should be limited in its operation by way of estoppel to accord with this intention. "A recital is a narration of such deeds, agreements, or facts as are necessary to explain the grantor's title, and the motives and reasons upon which the deed is founded and entered into. The operation of deeds is a question of intention, and will not be carried further than the parties appear from the tenor of the whole instrument to have agreed; and the doctrine of estoppel is no exception to this general principle. Accordingly, the introduction of a statement into a sealed instrument will not render it conclusive, unless there is sufficient reason for believing that such was the design, or some injustice would result from allowing it to be contradicted. And so it has been held that formal statements and admissions, which were perhaps looked upon as unimportant when made, and by which no one was ever deceived or induced to alter his position, are not conclusive. And so as estoppels are founded on intention, they will be limited by it, and will not extend to objects that the parties cannot reasonably be supposed to have had in view. A recital may consequently be an estoppel for some purposes and not for others. Indeed, as has been said, nothing is more obvious than the injustice that would ensue if the formal receipts introduced into conveyances for the convenience of the grantee, and with a view to facilitate the transfer of the title to subsequent purchasers, were treated as conclusive, in opposition to the truth of the case and the understanding of the parties. The estoppel of a deed will be limited to suits based upon it, or growing out of the transaction in which it was executed, and will not extend to a collateral action where the cause is different, although the subject-matter may be the same."¹

§ 1311. Estoppel against estoppel.—There may be an estoppel against an estoppel. Thus, a person conveyed

¹ *McCullough v. Dashiell*, 78 Va. 634, 640.

with covenants of warranty land claimed by his father, and after his father had died, bought the same land from the heirs and took a deed therefor. One of the heirs was the wife of the grantee in the first deed, who with such grantee released all her right to the land. The court held that the first grantee could not claim the share of his wife against his own deed, the estoppel on either side neutralizing each other; but as to the residue he was not prevented from availing himself of the estoppel created by his grantor's deed.¹ If A conveys a tract of land by way of mortgage to B, and subsequently, in consideration of an agreement on the part of C to discharge the mortgage, he conveys to C a part of the mortgaged land, inserting in his deed a covenant that the land embraced in the deed is free from encumbrances, the mortgage, so far as the rights of A and C are concerned, is not to be considered an encumbrance included by the covenant.² Under this principle falls the rule which we have previously noticed, that a party accepting a deed with a covenant of seisin is prevented from asserting the breach of the covenant, founded on his own seisin of the premises at the time when he accepted the deed.³

§ 1311 a. **Reference to streets, alleys, and plats.**—An easement of way in a street on which the land conveyed in the deed is described as situated, is acquired by the grantee only when the grantor owns the street.⁴ A party who has acquired his title by the purchase of a quitclaim deed from a county will not be allowed, as against a former grantee from the county, to deny the power of the county to make a sale of the land.⁵ When land is described in a deed as "bounded upon an alley," the grantor and those claiming under him with notice are estopped from inter-

¹ Kimball v. Schoff, 40 N. H. 190.

² Watts v. Welman, 2 N. H. 458.

³ Fitch v. Baldwin, 17 Johns. 161, 166. See, also, Brown v. Staples, 28 Me. 497; 48 Am. Dec. 504. See § 891, *ante*.

⁴ Cole v. Hadley, 162 Mass. 579.

⁵ Roberts v. Northern Pac. R. R. Co., 158 U. S. 1.

fering with the use of the alley by the grantee.¹ Where land is platted by the owners, and sold by a description according to the plat, the owners are estopped from claiming that the plat was void because not acknowledged as required by statute.² A grantee is not estopped from denying his grantor's title.³ Where lots bounding on a private street have been sold by an executor, his successors are estopped as against lotowners asking an apportionment of the damages for the condemnation of a part of the street, to contend that the street was illegal, and that no easement on it passed as appurtenant to the lots.⁴

§ 1312. **False representations.**—If a person, by reason of the representation of a mortgagee of land that the mortgage debt is paid, releases an attachment on the goods of the mortgagor, and takes a second mortgage on the same land for the purpose of securing his debt, which he had previously secured by an attachment, the second mortgage, notwithstanding that the first mortgage was on record at the time of the representation, will take precedence over the first mortgage, as between the two mortgagees.⁵

§ 1313. **Parol evidence.**—Though the mortgagee's title is recorded, parol evidence is admissible to raise this estoppel. "It is true that title by mortgage deed cannot be released by parol. But although the legal title might exist, as a paper title, the party may not be able to enforce it, or render it effectual. This species of defense, when offered to control written conveyances or title deeds, is no more obnoxious to the objection of permitting oral evidence to control written, than exists in the ordinary cases of setting aside conveyances for fraud upon oral proof."⁶

¹ *Rogers v. Bollenger*, 59 Ark. 12.

² *Pillsbury v. Alexander*, 40 Neb. 242.

³ *Wenzel v. Schultz*, 100 Cal. 250.

⁴ *In re St. Nicholas Terrace*, 143 N. Y. 621.

⁵ *Platt v. Squire*, 12 Met. 494.

⁶ *Platt v. Squire*, 12 Met. 494, 500, per Dewey, J.

§ 1314. **Valuable consideration.**—As has been seen in a previous chapter, only subsequent purchasers who have paid a valuable consideration are protected against prior unrecorded conveyances of which they had no notice. An action of ejectment was brought for a piece of land, and it appeared that A had purchased the land, but caused the deed to be taken in the name of B. This deed was placed on record. Possession of the land was taken by A, and subsequently B, at the request of A, executed a deed conveying the title to him, but this latter deed was not recorded until after the commencement of the action of ejectment. After the execution of this deed from B to A, the former at the request of the latter executed a deed reciting a valuable consideration to C, who at the time was an unmarried woman, but who became subsequently the wife of A. This deed, however, was not delivered or recorded until after the marriage. It did not appear that C knew of the execution of the former deed, but she had given no consideration for the deed executed to her. Still later, A for a valuable consideration sold the land to D. The court decided that there was no estoppel in favor of C as against D, who held the legal title.¹

§ 1315. **Estoppel of grantor in trust deed.**—In the chapter treating of the execution of deeds under powers of sale in trust deeds and mortgages, we showed that the provisions of the deed as to the giving of notice must be strictly followed in order to pass to the grantee of the trustee a valid title. But in this chapter we may notice the effect of an agreement on the part of the debtor that the advertisement of sale may be for a less time than that expressed in the deed. If the debtor makes such an agreement, he cannot afterward object that the provisions in the deed as to advertising were not strictly observed.² “Clearly, where the owner of the property agrees that the advertisement may be for a shorter period than that

¹ *Morse v. Wright*, 60 Cal. 260.

² *Maulsby v. Barker*, 3 Mackey (D. C.), 165.

expressed in the deed, he is estopped from setting up the objection that the provision made in the deed as to advertising was not followed.”¹

§ 1316. **Mutuality.**—“An estoppel must be mutual. Both parties must be bound, or neither is estopped.”² For the purpose of securing a part of the purchase money remaining unpaid, a vendor took from his vendee a confession of judgment, and afterward executed a deed conveying the legal title to the vendee, and in the deed acknowledged the payment of the purchase money. By the deed, the vendor released to the vendee, his heirs and assigns, all his “estate, right, title, interest, claim, and demand whatsoever, in law or equity,” in or to the land. The deed also contained a general covenant of warranty. On the ground that an estoppel by deed can be taken advantage of only by parties and privies, in which class a judgment creditor does not come, the court decided that the vendor was not estopped by his deed from setting up his prior judgment against a subsequent judgment creditor of the vendee. But the court also decided that the vendor’s conduct being such as to induce the belief that he had no further claim upon the land, the vendor by an estoppel *in pais* was precluded from setting up his judgment against those who, on the faith of the existence of the facts recited in the deed, had given credit to the vendee.³

§ 1317. **Title from same source.**—If a party receives a title from the same source as another, he is not estopped from disputing that title against others claiming from the same source when no contract relations exist between them. In such a case Chief Justice Marshall, speaking of the doctrine of estoppel, says: “This principle originates in the relation between lessor and lessee, and, so far as respects them, is well established, and ought to be

¹ *Maulsby v. Barker*, 3 Mackey (D. C.), 165, per James, J.

² *Longwell v. Bentley*, 3 Grant Cas. 177.

³ *Waters' Appeal*, 35 Pa. St. 523; 78 Am. Dec. 354.

maintained. The title of the lessee is, in fact, the title of the lessor. He comes in by virtue of it, holds by virtue of it, and rests upon it to maintain and justify his possession. He professes to have no independent right in himself, and it is a part of the very essence of the contract under which he claims that the paramount ownership of the lessor shall be acknowledged during the continuance of the lease, and that possession shall be surrendered at its expiration. He cannot be allowed to controvert the title of the lessor without disparaging his own, and he cannot set up the title of another without violating that contract by which he obtained and holds possession, and breaking that faith which he has pledged, and the obligation of which is still continuing and in full operation. In considering this subject, we ought to recollect, too, the policy of the times in which this doctrine originated. It may be traced back to the feudal tenures, when the connection between landlord and tenant was much more intimate than it is at present; when the latter was bound to the former by ties not much less strict, nor not much less sacred, than those of allegiance itself. The propriety of applying the doctrines between lessor and lessee to a vendor and vendee may well be doubted. The vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor. The rights of the vendor are intended to be extinguished by the sale, and he has no continuing interest in the maintenance of his title, unless he should be called upon in consequence of some covenant or warranty in his deed. The property having become by the sale the property of the vendee, he has a right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this; nor is either the letter or spirit of the contract violated by it. The only controversy which ought to arise between him and the vendor respects the payment of the purchase money. How far

he may be bound to this by law, or by the obligations of good faith, is a question depending on all the circumstances of the case, and, in deciding it, all those circumstances are examinable. If the vendor has actually made a conveyance, his title is extinguished in law as well as equity, and it will not be pretended that he can maintain an ejectment. If he has sold, but has not conveyed, the contract of sale binds him to convey, unless it be conditional."¹ In a suit to recover possession of land the plaintiff is not estopped by the fact that a deed of partition was executed by a former owner, from whom he obtained his title, and others, by which the premises in controversy were set off to the plaintiff's grantor and another person, with whom the defendant did not connect himself; nor is he estopped by the fact that a former owner through whom plaintiff derives title had executed a deed of quitclaim to a person who subsequently died; nor by the fact that such owner had executed a deed of adjoining land in which the premises in controversy were referred to as having been sold to the person deceased.² A person in possession of lands under a devise in fee to himself may purchase and take a deed from another claiming to have an adverse title. He may, if he desires, dispute the validity of the title thus purchased. The doctrine of estoppel does not apply.³ Said Mr. Justice Bronson: "Although a tenant cannot question the right of his landlord, a grantee in fee may hold adversely to the grantor, and there can be no good reason why he should not be at liberty to deny that the grantor had any title. There is no estoppel where the occupant is not under an obligation, express or implied, that he will at some time or in some event surrender the possession. The grantee in fee is under no such obligation. He does not receive the possession under any contract, express or

¹ *Blight's Lessee v. Rochester*, 7 Wheat. 535, 547.

² *Buffum v. Hutchinson*, 1 Allen, 58.

³ *Osterhout v. Shoemaker*, 4 Hill, 513.

implied, that he will ever give it up. He takes the land to hold for himself, and to dispose of it at pleasure. He owes no faith or allegiance to the grantor, and he does him no wrong when he treats him as an utter stranger to the title.”¹

¹ In *Osterhout v. Shoemaker*, 3 Hill, 513, 518.

CHAPTER XXXVII.

MERGER.

- § 1318. A question of intention.
- § 1319. Continued.
- § 1320. Reference in deed to cancellation of mortgage.
- § 1321. Payment of mortgage.
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- § 1323. Purchase of equity of redemption by prior mortgagee.
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- § 1325. Mortgagee's purchase.
- § 1326. Mortgage remaining uncanceled.
- § 1327. Ignorance of another mortgage.
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- § 1328. Reaffirmation of mortgage.
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- § 1330. Cancellation of mortgage by deed.
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- § 1332. Comments.
- § 1333. Quitclaim deed.
- § 1334. Tenants in common.
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- § 1337. Deed for part of land.
- § 1338. Two mortgages.
- § 1339. Possession by mortgagee.
- § 1340. Prior assignee.
- § 1341. Mortgage in trust for married woman.
- § 1342. Reliance upon record.
- § 1343. Married women.
- § 1344. Deed to sureties.
- § 1345. Payment by party bound.
- § 1346. Covenant against encumbrances.

§ 1318. A question of intention.—Where the legal estate and an equitable estate become vested in the same person, in the same right, the equitable will merge in most instances in the legal estate.¹ But the question of

¹ *Hopkinson v. Dumas*, 42 N. H. 306; *James v. Morey*, 2 Cowen, 246; 14 Am. Dec. 475; *Brown v. Bontee*, 10 Smedes & M. 268; *Little v. Bowen*,

whether in a given case there has been a merger, or, the two estates are to be kept distinct, is a question of intention, generally determined by the interest of the person in whom the estates are vested, or by the requirements of substantial justice.¹ For instance, where land is subject to two

76 Va. 724; *Gardner v. Astor*, 3 Johns. Ch. 53; 8 Am. Dec. 465; *Wills v. Cooper*, 1 Dutch. 137; *Mason v. Mason*, 2 Sand. Ch. 433; *Nicholson v. Halsey*, 1 Johns. Ch. 422; *Healy v. Alston*, 25 Miss. 190; *Habergnam v. Vincent*, 2 Ves. Jr. 204; *Hancock v. Hancock*, 22 N. Y. 568; *Hatch v. Kimball*, 14 Me. 9; *Davis v. Pierce*, 10 Minn. 376; *Wade v. Page*, 1 Brown Ch. 363; *Finch's Case*, 4 Inst. 85; *Selby v. Alston*, 3 Ves. 339; *Lyon v. McIlvaine*, 24 Iowa, 9; *Philips v. Brydges*, 3 Ves. 126; *Downes v. Grazebrook*, 3 Mer. 208; *Ayliff v. Murray*, 2 Atk. 59; *Goodright v. Wells*, Doug. 771; *Harmwood v. Oglander*, 8 Ves. 127; *Cooper v. Cooper*, 1 Halst. Ch. 433; *Byington v. Fountain*, 61 Iowa, 512.

¹ *Pike v. Gleason*, 60 Iowa, 150; *Simonton v. Gray*, 34 Me. 50; *Mallory v. Hitchcock*, 29 Conn. 127; *Fassett v. Mulock*, 5 Colo. 466; *Baldwin v. Norton*, 2 Conn. 161; *Bassett v. Mason*, 18 Conn. 131; *Lockwood v. Sturtevant*, 6 Conn. 373; *Franklyn v. Hayward*, 61 How. Pr. 43; *Robinson v. Leavitt*, 7 N. H. 73; *Grover v. Thatcher*, 4 Gray, 526; *Gibson v. Crehore*, 3 Pick. 475; *Loud v. Lane*, 8 Met. 517; *Given v. Marr*, 27 Me. 212; *Hatch v. Kimball*, 14 Me. 9; *Hatch v. Kimball*, 16 Me. 146; *Holden v. Pike*, 24 Me. 427; *Slocum v. Catlin*, 22 Vt. 137; *Smith v. Roberts*, 91 N. Y. 470; *Downer v. Fox*, 20 Vt. 388; *Hunt v. Hunt*, 14 Pick. 374; 25 Am. Dec. 400; *Tuttle v. Brown*, 14 Pick. 514; *Brooks v. Rice*, 56 Cal. 428; *White v. Hampton*, 13 Iowa, 259; *Shimer v. Hammond*, 51 Iowa, 401; *Evans v. Kimball*, 1 Allen, 240; *Marshall v. Wood*, 5 Vt. 250; *Bullard v. Leach*, 27 Vt. 491; *Walker v. Baxter*, 26 Vt. 710; *Myers v. Brownell*, 1 Chip. D. 448; *Silliman v. Gammage*, 55 Tex. 365; *Hinchman v. Emans*, 1 N. J. Eq. (Sax.) 100; *Duncan v. Smith*, 31 N. J. L. 325; *Bailey v. Willard*, 8 N. H. 429; *Johnson v. Elliott*, 26 N. H. 67; *Stantons v. Thompson*, 49 N. H. 272; *Heath v. West*, 26 N. H. 191; *Hutchins v. Carleton*, 19 N. H. 487; *Bell v. Woodward*, 34 N. H. 90; *Weld v. Sabin*, 20 N. H. 533; 51 Am. Dec. 240; *Drew v. Rust*, 36 N. H. 335; *Moore v. Beasom*, 44 N. H. 215; *McClain v. Sullivan*, 85 Ind. 174; *Grellet v. Heilshorn*, 4 Nev. 526; *Edgerton v. Young*, 43 Ill. 464; *Lyon v. McIlvaine*, 24 Iowa, 9; *Richardson v. Hockenhull*, 85 Ill. 124; *Durham v. Craig*, 79 Ind. 117; *Vanderkemp v. Shelton*, 11 Paige, 28; *McGiven v. Wheelock*, 7 Barb. 22; *Lebanon Bank v. Essex*, 84 Ind. 144; *Millspaugh v. McBride*, 7 Paige, 509; 34 Am. Dec. 360; *Sheldon v. Edwards*, 35 N. Y. 279; *Bissell v. Lewis*, 56 Iowa, 231; *Skeel v. Spraker*, 8 Paige, 182; *James v. Johnson*, 6 Johns. Ch. 417; *Champney v. Coope*, 34 Barb. 539; *Kellogg v. Ames*, 41 Barb. 218; *Loomer v. Wheelwright*, 3 Sand. Ch. 135; *Judd v. Seekins*, 62 N. Y. 266; *Angel v. Boner*, 38 Barb. 425; *Clift v. White*, 12 N. Y. 519; *Fox v. Weishuhu*, 55 Tex. 33; *Starr v. Ellis*, 6 Johns. Ch. 393; *Gardner v. Astor*, 3 Johns. Ch. 53; 8 Am. Dec. 465; *White v. Knapp*, 8 Paige, 173; *Spencer v. Ayrault*, 10 N. Y. 202; *Bascom v. Smith*, 34 N. Y. 320; *Day*

mortgages of different dates, and a person buys the land and takes an assignment of the senior mortgage for the protection of his title, there will not be a merger of such mortgage with the equity of redemption, so as to give the junior mortgagee a preference in the division of the proceeds of a sale of the mortgaged premises.¹ Nor will there be a merger if the owner of the mortgaged premises conveys them to a mortgagee in satisfaction of the mortgage debt, for the purpose of saving the expense of a foreclosure, when an intervening mortgage exists.²

§ 1319. *Continued.*—Where A made a deed absolute upon its face, but intended as a mortgage to secure a note to B, and afterward executed a mortgage to C, and subsequently B assigned his note and interests in the property to D, and the latter in a short time afterward procured a deed of the property from A, and then reassigned the mortgage interest to B, who commenced a suit for foreclosure, it was

v. Mooney, 4 Hun, 134; *Snyder v. Snyder*, 6 Binn. 483; 6 Am. Dec. 493; *Davis v. Pierce*, 10 Minn. 376; *Duncan v. Drury*, 9 Pa. St. 332; 49 Am. Dec. 565; *Wallace v. Blair*, 1 Grant Cas. 75; *Carter v. Taylor*, 3 Head, 30; *Hinds v. Ballou*, 44 N. H. 619; *Van Wagenen v. Brown*, 26 N. J. L. 196; *Den v. Vanness*, 10 N. J. L. (5 Halst.) 102; *Hart v. Chase*, 46 Conn. 207; *Donald v. Plumb*, 8 Conn. 453; *Dircks v. Logsdon*, 59 Md. 173; *Nurse v. Yerwarth*, 3 Swanst. 608; *Carpenter v. Brenham*, 40 Cal. 221; *Mole v. Smith, Jacob*, 490. See *St. Paul v. Viscount Dudley*, and *Ward*, 15 Ves. 167; *Thom v. Newman*, 3 Swanst. 603; *Callaghan v. O'Brien*, 136 Mass. 378; *De Lisle v. Herbs*, 25 Hun, 485; *Bank v. Reis*, 136 Ill. 242; *Watson v. Gardner*, 119 Ill. 312; *Gresham v. Ware*, 79 Ala. 192; *Scrivner v. Dietz*, 84 Cal. 295; *Osborne v. Taylor*, 60 Conn. 107; *Myers v. O'Neal*, 130 Ind. 370; *Hanlon v. Doherty*, 109 Ind. 37; *Green v. Currier*, 63 N. H. 563; *Little v. Bowen*, 76 Va. 724; *Watson v. Dundee M. & T. Ins. Co.*, 12 Or. 474; *Keith v. Wheeler*, 159 Mass. 161; *Burton v. Perry*, 146 Ill. 71; *National Ins. Co. v. Nordin*, 50 Minn. 336; *Sieberling v. Tipton*, 113 Mo. 373; *Jewett v. Tomlinson*, 137 Ind. 326; *Coburn v. Stephens*, 137 Ind. 683; 45 Am. St. Rep. 218; *Freeman v. Moffett*, 119 Mo. 280; *McCrory v. Little*, 136 Ind. 86; *Burt v. Gamble*, 98 Mich. 402; *Walker v. Goodsill*, 54 Mo. App. 631; *Sprague v. Beamer*, 45 Ill. App. 17.

¹ *Millspaugh v. McBride*, 7 Paige, 509; 34 Am. Dec. 360.

² *Brooks v. Rice*, 56 Cal. 428. For a discussion of the rule that all stipulations contained in an antecedent contract to convey are merged in the deed subsequently executed, and delivered and accepted as performance of the contract, see §§ 850 a and 850 b, *ante*.

held that there was no merger so as to give C's mortgage priority over that of B.¹ "In law, a merger always takes place when a greater estate and a less coincide and meet in the same person, in one and the same right, without any intermediate estate. The lesser estate is said to be annihilated or merged in the greater; but a court of equity is not guided in this matter by the rules of law. It will sometimes hold a charge extinguished where it would continue to exist at law; and sometimes preserve it, when at law it would be merged. The question is one of intention, actual or presumed, of the person in whom the interests are united."² Mr. Chief Justice Treat says that the conclusion from all the authorities clearly is, "that if a party acquires an estate upon which he has an encumbrance, the encumbrance is, in equity, considered as subsisting or extinguished, according to his intentions, expressed or implied. The intention is the controlling consideration, where it has made been known, or can be inferred from the acts and conduct of the party. And the court will look into all the circumstances of the case to ascertain his real intention. If it appears that he intended to discharge the encumbrance, and rely exclusively upon his newly-acquired title, the encumbrance is regarded as extinguished, and cannot afterward be set up to strengthen and support that title. If no intention has been manifested, equity will consider the encumbrance as subsisting, or extinguished, as may be most conducive to the interests of the party. If no evidence of his intention

¹ *Grellet v. Heilshorn*, 4 Nev. 526.

² *Rumpp v. Gerkens*, 59 Cal. 496, per Mr. Justice Thornton, in delivering the opinion of the court. Merger cannot be proven solely by the record, as the question is one of intent: *Chase v. Van Meter*, 140 Ind. 321; 39 N. E. Rep. 455. When a mortgagor conveys the land to a second mortgagee fraudulently including in the deed a provision obligating the grantee to assume and pay the first mortgage and a third mortgage of which the grantee is ignorant, and the deed is not delivered, but is placed on record by the grantor, and the grantee repudiates it as soon as he learns of its effect, and there is no change of possession of the property, nor surrender of the mortgage and note, there is no merger: *Cook v. Foster*, 96 Mich. 610.

appears, and it is a matter of indifference to him whether the encumbrance be kept alive or not, it is regarded as extinguished.”¹

§ 1320. **Reference in deed to cancellation of mortgage.**—Although a deed of warranty may refer to a mortgage for the purchase money “as having been canceled by assignment,” the mortgage will not thereby become merged in the legal title when the interests of the holder of the mortgage require it to be upheld.² “Mergers are not favored in law or in equity, and the separate estates will be sustained when the parties so intend, and this intention will be inferred when justice permits, and the interests of the parties require it.”³ If a deed is fraudulent as against the grantor’s creditors, and the grantee takes from a prior mortgagee a deed of quitclaim of all his interest in the premises which contains these words, “which said mortgage is hereby canceled and discharged, the said” grantor, naming him, “having recently conveyed his interests in the premises” to the grantee named, the deed constitutes an assignment, and will not have the effect of a merger as against the creditors of the grantor.⁴

§ 1321. **Payment of mortgage.**—When a mortgage is paid, the intention of the parties at the time payment is made must control the effect to be given to such payment, in considering whether there has been a merger, or whether the equitable title will still be considered as in existence. If it is apparent that the intention at the time was to discharge the mortgage, this intention must prevail, and no subsequent change of intention can operate to give effect to a lien that has been intentionally destroyed.⁵ Thus, an owner of land on which there were

¹ In *Campbell v. Carter*, 14 Ill. 286, 290.

² *Bean v. Boothby*, 57 Me. 295.

³ *Bean v. Boothby*, 57 Me. 295, per Danforth, J.

⁴ *Crosby v. Taylor*, 15 Gray, 64; 77 Am. Dec. 352.

⁵ *Given v. Marr*, 27 Me. 212; *Hunt v. Hunt*, 14 Pick. 374; 25 Am. Dec. 400; *Champney v. Coope*, 34 Barb. 539; *Gayle v. Wilson*, 30 Gratt. 166; *Cole v. Edgerly*, 48 Me. 108; *Loomer v. Wheelwright*, 3 Sand. Ch. 135;

four trust deeds conveyed it to his brother, the deed recognizing such trust deeds. The grantee covenanted to pay off the debts of the grantor, for which he and two others were bound as sureties. The grantee paid part of the first, second, and third mortgage debts, but received no assignment from the creditors. The property conveyed was worth considerably more than the mortgage and other debts at the time of the execution of the deed, but had since that time depreciated in value, and finally the trustee in the first two deeds sold the land to pay the amount still due, and there remaining a balance, it was decided that the grantee was not entitled to have this balance applied to reimburse him for what he had paid upon the debts secured by the first three deeds; as he was to be considered as paying his own debts.¹

§ 1322. **Estoppel.**—The grantor may be estopped, when he sells the land as free from encumbrances, from asserting as against the purchaser that a merger did not occur of two titles united in him.² And on the other hand, the owner who has reissued a mortgage paid by himself, may be estopped from attacking its validity by asserting that there was a merger at the time of payment.³ Thus, a purchaser of land subject to a mortgage which the purchaser in his deed has assumed and agreed to pay as a part of the consideration, may, after having paid the mortgage and taken an assignment of it in blank at the time of payment instead of a satisfaction, reissue such mortgage by filling up the blank with another's name, and such mortgage is perfectly valid.⁴ "The owner of lands," said Cooley, J., "who treats a mortgage upon the lands, which has been assigned to him as a valid instrument, and transfers it as such, is estopped from insisting, as against the

Aiken v. Milwaukee & St. Paul R. R. Co., 37 Wis. 469; *Gardner v. Astor*, 3 Johns. Ch. 53; 8 Am. Dec. 465. See *Willson v. Burton*, 52 Vt. 394; *Dickason v. Williams*, 129 Mass. 182; 37 Am. Rep. 316.

¹ *Gayle v. Wilson*, 30 Gratt. 166.

² *Bulkeley v. Hope*, 1 Kay & J. 482; 1 Jur., N. S., 864.

³ *Kellogg v. Ames*, 41 N. Y. 259; *Powell v. Smith*, 30 Mich. 451.

⁴ *Kellogg v. Ames*, 41 N. Y. 259.

assignee or anyone claiming under him, that in his hands it had merged and disappeared in the fee."¹

§ 1323. Purchase of equity of redemption by prior mortgagee.—Undoubtedly, as a general proposition, where a prior mortgagee purchases the equity of redemption, his mortgage and such equity of redemption do not become merged so as to make the whole title subject to a second mortgage. But if a prior mortgagee purchases by deed the equity of redemption, and afterward sells the land for a price sufficient to pay the sum paid for the equity of redemption and also both the mortgages, his mortgage by such sale becomes satisfied. On the foreclosure of the second mortgage the proceeds of the foreclosure sale will be first applied in discharge of the second mortgage.²

§ 1324. Same person and same right.—To effect a merger of two estates, they must vest in the same person and in the same right.³ There cannot be the merger of an equitable estate into a partial or particular legal estate.⁴

¹ In *Powell v. Smith*, 30 Mich. 451, 452. Where notes becoming due at different times are secured by mortgage, and the mortgage is foreclosed as to the last note, it may be foreclosed again against the purchaser of the equity of redemption after foreclosure, who assumed to pay the other notes as a part of the purchase money. Such purchaser is estopped from asserting that the mortgage was merged by foreclosure: *Hill v. Minor*, 79 Ind. 48.

² *Webb v. Meloy*, 32 Wis. 319. See *International Bank v. Wilshire*, 108 Ill. 143; *Pike v. Gleason*, 60 Iowa, 150. Where the equity of redemption is purchased by the mortgagee, and by consent of the mortgagor he retains the mortgage for the purpose of cutting off liens created after its execution, the mortgage is not merged in the title: *Gibbs v. Johnson*, 104 Mich. 120; 62 N. W. 145. Where the legal title is purchased by the holder of a senior mortgage he is entitled to keep his mortgage alive to protect the title against a valid later mortgage: *Swatts v. Bowen*, 141 Ind. 322; 40 N. E. Rep. 1057.

³ *Stantons v. Thompson*, 49 N. H. 272; *Lockwood v. Sturdevant*, 6 Conn. 373; *Hunt v. Hunt*, 14 Pick. 374; 25 Am. Dec. 400. See *New England Jewelry Co. v. Merriam*, 2 Allen, 390; *Denzler v. O'Keefe*, 34 N. J. Eq. 361; *Grover v. Thatcher*, 4 Gray, 526; *Dutton v. Ives*, 5 Mich. 515; *Bell v. Woodward*, 34 N. H. 90.

⁴ *Philips v. Brydges*, 3 Ves. 125; *Selby v. Alston*, 3 Ves. 339; *Haber-*

"In order to effect a merger at law, the right previously existing in an individual, and the right subsequently acquired, in order to coalesce and merge, must be precisely coextensive, must be acquired and held in the same right, and there must be no right outstanding in a third person to intervene between the right held and the right acquired."¹ There will be no merger where the *cestui que trust* acquires the legal title by a conveyance which is void.² If a tenant for life pays off an encumbrance, as his estate is a temporary one, a merger will not be presumed.³ Where a wife was, before marriage, possessed of a term of years, renewable forever, in a city lot, and her husband, after marriage, purchased the reversion to this lot, nothing being said in the deed conveying the reversion as to extinguishing the term, it was held that there was no merger by which the interest of the wife in the property was extinguished, but that it survived to her on the death of the husband.⁴ When a mortgagee succeeds as a devisee under a will to an undivided half of the premises, there is no merger.⁵ Where a trustee for a married woman purchased a mortgage on the trust property executed by the *cestui que trust*, and her husband, before the conveyance to him, and subsequently in compliance with the directions of his *cestui que trust*, conveyed the land, subject to the mortgage, and, at the same time, assigned the mortgage to the grantee, no merger, it was held, was caused of the mortgage in the trustee's hands. Judgments, therefore, obtained against him before the

gham v. Vincent, 2 Ves. Jr. 204; Boteler v. Allington, 1 Bro. Ch. 72; Hunt v. Hunt, 14 Pick. 374; 25 Am. Dec. 400; Merest v. James, 6 Madd. 118; Donalds v. Plumb, 8 Conn. 453; Goodright v. Wells, Doug. 771.

¹ Hunt v. Hunt, 14 Pick. 374, 384; 25 Am. Dec. 400, per Shaw, C. J.

² Buchanan v. Harrison, 1 Johns. & H. 662; Elliott v. Armstrong, 2 Blackf. 208; Brandon v. Brandon, 31 Law J. Ch. 47.

³ Burrell v. Egremont, 7 Beav. 205; State v. Kock, 47 Mo. 582; Pitt v. Pitt, 22 Beav. 294; Faulkner v. Daniel, 3 Hare, 217; Redington v. Redington, 1 Ball & B. 139.

⁴ Clark v. Tennyson, 33 Md. 85.

⁵ Sahler v. Signer, 44 Barb. 606.

execution of his conveyance could not operate as liens on the property.¹

§ 1325. Mortgagee's purchase.—It is generally to the mortgagee's interest to preserve his mortgage interest when there are other liens. In case he purchases the equity of redemption, there will not generally be a merger, so as to make another lien superior, unless the intention of the parties is that the two interests shall merge.² If in the deed taken by the mortgagee it is expressly stated that the deed is subject to the mortgage, and if subsequently the mortgagee collects part of the mortgage debt, these facts show an intention to preserve the existence of the mortgage and prevent a merger. The registration of the deed is notice of this intention to all persons subsequently dealing with the property.³ If, in such a case, the mortgagee afterward transfers the note secured by the mortgage for the purpose of indemnifying a surety, and then executes a deed of trust upon the land, the surety can foreclose the mortgage to the amount

¹ *Denzler v. O'Keefe*, 34 N. J. Eq. 361.

² *Mallory v. Hitchcock*, 29 Conn. 127; *Hoppock v. Ramsey*, 28 N. J. Eq. 413; *Huebsch v. Scheel*, 81 Ill. 281; *Brooks v. Rice*, 56 Cal. 428; *Ætna Life Ins. Co. v. Corn*, 89 Ill. 170; *Mulford v. Peterson*, 35 N. J. L. 127; *Tower v. Devine*, 37 Mich. 443; *Delaware & Hudson Canal Co. v. Bonnell*, 46 Conn. 9; *New Jersey Ins. Co. v. Meeker*, 40 N. J. L. 18; *Knowles v. Lawton*, 18 Ga. 476; 63 Am. Dec. 290; *Rogers v. Herron*, 92 Ill. 583; *Clos v. Boppe*, 23 N. J. Eq. 270; *Thompson v. Boyd*, 21 N. J. L. (1 Zab.) 58; s. c. 22 N. J. L. 543; *Slocum v. Catlin*, 22 Vt. 137; *McClaskey v. O'Brien*, 16 W. Va. 791; *Richardson v. Hockenhull*, 85 Ill. 124; *Freeman v. Paul*, 3 Me. 260; 14 Am. Dec. 237; *International Bank v. Wilshire*, 108 Ill. 143; *Andrus v. Vreeland*, 29 N. J. Eq. 394; *Duncan v. Smith*, 31 N. J. L. 325; *Fithian v. Corwin*, 17 Ohio St. 117; *Edgerton v. Young*, 43 Ill. 464; *Woodhull v. Reid*, 16 N. J. L. 128; *Goodwin v. Keney*, 47 Conn. 486; *Linscott v. Lamart*, 46 Iowa, 312; *Fellows v. Dow*, 58 N. H. 21; *Walker v. Baxter*, 26 Vt. 710; *Wickersham v. Reeves*, 1 Iowa, 413; *Dunphy v. Riddle*, 86 Ill. 22. See *White v. Hampton*, 13 Iowa, 259; *Campbell v. Vedder*, 1 Abb. N. Y. App. 295; *Spurgin v. Adamson*, 62 Iowa, 661; *Aldrich v. Blake*, 134 Mass. 582; *Duffy v. McGuiness*, 13 R. I. 195; *Scrivner v. Dietz*, 84 Cal. 295; *Fouche v. Swain*, 80 Ala. 151; *New Jersey Ins. Co. v. Meeker*, 40 N. J. L. 18; *Gray v. Nelson*, 77 Iowa, 63; *Ann Arbor Sav. Bank v. Webb*, 56 Mich. 377; *Linscott v. Lamart*, 46 Iowa, 312; *Woodward v. Davis*, 53 Iowa, 694.

³ *Ætna Life Ins. Co. v. Corn*, 89 Ill. 170.

which he was compelled to pay for his principal against a purchaser under the trust deed.¹ But where a mortgagor conveyed land to a stranger who assumed and agreed to pay the mortgage, and the latter afterward conveyed the land to the mortgagee by a deed in which it was recited that the conveyance was subject to the mortgage, it was held that the mortgage became merged in the legal title, which prevented the mortgagee from maintaining an action against the mortgagor on the note, notwithstanding the fact that the value of the land at the time of the execution of the last deed was not equal to the amount of the mortgage.² A surrender of a defeasance and giving up the note and discharging the debt, with the intent to make the deed absolute, is a valid transaction, and the mortgagee is estopped from claiming the debt, and the mortgagor the land.³

§ 1326. **Mortgage remaining uncanceled.**—It is said that the fact that a mortgage is uncanceled of record is indicative of an intention to keep it alive.⁴ A mortgaged to B an undivided fifth of land, of which B already owned three-fifths, B taking possession of the interest mortgaged, and remaining in possession till her death, but in her lifetime had acquired A's equity of redemption, and in the same year made a will in which she devised the land to C for life, and, after his death, to D. A year after the execution of her will, she assigned the mortgage for value to E. After B's death, C entered into possession of the land under the devise, and was in possession of it when E brought an action to foreclose. The court held that there was no merger of the mortgage with the title obtained by B, as her assignment of the mort-

¹ *Ætna Life Ins. Co. v. Corn*, 89 Ill. 170.

² *Dickason v. Williams*, 129 Mass. 182; 37 Am. Rep. 316. A purchase by the mortgagee will not result in a merger so as to let in a mechanic's lien for material supplied after recordation of the mortgage: *Coburn v. Stephens*, 137 Ind. 683; 45 Am. St. Rep. 218.

³ *Watson v. Edwards*, 105 Cal. 70. See, also, *Green v. Butler*, 26 Cal. 595.

Hoppock's Executors v. Ramsey, 28 N. J. Eq. 413, 417.

gage was sufficient evidence of an intent to keep the interests distinct.¹

§ 1327. Ignorance of another mortgage.—If a mortgagee who does not know of the existence of a subsequent mortgage, and does not intend to release his lien, takes a deed from the mortgagor in satisfaction of the mortgage, his mortgage is not extinguished, so as to prevent him from using it as a protection of his rights against a junior mortgage.²

§ 1327 a. Mistake in satisfaction of mortgage.—If there has been inadvertence or mistake in the satisfaction of a mortgage, a subsequent lienholder, whose rights have not been acquired after the prior mortgage has been marked satisfied, but who took his mortgage while such prior mortgage was in effect recorded and unsatisfied, and knowing that it was a valid lien, will not be allowed in equity to avail himself of the mistake.³ Where a mortgage has been executed by two tenants in common to secure the purchase money, and one of them has conveyed his interest in the land to his cotenant, in consideration of the latter paying the full amount remaining due on the mortgage, and, upon payment being made, the mortgage is satisfied of record, without knowledge on the part of the person paying that his grantor had previously executed a deed of trust of his half of the land, the person paying the mortgage may maintain an action to revive it, and is entitled to be subrogated to the rights of the assignee of the mortgage as against the holder of the deed of trust.⁴

§ 1328. Reaffirmation of mortgage.—The transaction may be such as simply to reaffirm the mortgage and extend the time of payment. For example, A mortgaged

¹ *Goodwin v. Keney*, 47 Conn. 486.

² *Rumpp v. Gerkens*, 59 Cal. 496.

³ *Shaffer v. McCloskey*, 101 Cal. 576.

⁴ *Shaffer v. McCloskey*, 101 Cal. 576.

land to B to secure certain notes, and subsequently conveyed the same land to C. After this, C conveyed the land to B, but did not take up the notes of A, or obtain a discharge of the mortgage, but received from B a bond for a reconveyance of the land, when he, C, paid, in a time specified, the original notes of A secured by mortgage. B did not, by this transaction, obtain an absolute title, subject only to the stipulations of the bond. The mortgage was not discharged, but was reaffirmed, with the time for payment extended.¹

§ 1329. Purchase at execution sale.—Land upon which there was a mortgage lien prior to the entry of a judgment was sold on execution, and, before the expiration of the time for redemption, the purchaser bought and took an assignment of the mortgage and bond, foreclosed the mortgage, and became the purchaser at the foreclosure sale for a sum less than the amount due on the mortgage. In an action upon the bond for the deficiency, it was held that, until the time for redemption had expired, the purchaser acquired no title, and that his subsequent purchase of the bond and mortgage did not operate as payment of the bond.²

§ 1330. Cancellation of mortgage by deed.—Of course, where the parties intend that a deed shall cancel a mortgage, it will have this effect. But where a mortgagee received from a mortgagor a deed, which recited that the deed was made to cancel the mortgage, and an attachment made before the deed, and consummated by

¹ *Bailey v. Myrick*, 50 Me. 171.

² *Southworth v. Scofield*, 51 N. Y. 513. The mortgage debt is not extinguished by a purchase of the equity of redemption by the mortgagee at a sale under execution: *Lydecker v. Bogert*, 38 N. J. Eq. 136. As to the right of a purchaser to have an encumbrance paid off by creditors, to give a clear title on property afterward proved to have been exempt, enforced against the property, see *Beckman v. Meyer*, 75 Mo. 333. Where the mortgagee obtained title to the mortgaged premises by a deed from the mortgagor, the mortgage will not merge, but will be held superior to the lien of a prior purchaser under a sale on a judgment against the mortgagor junior to the mortgage: *Jewett v. Tomlinson*, 137 Ind. 326.

a levy afterward, took the land, the mortgage with the notes having remained in the possession of the mortgagee by a parol agreement to await the attachment, made at the time with the mortgagor, it was held that the deed did not discharge the mortgage.¹

§ 1331. Expression of intention against merger.—

If the deed executed by the owner of the equity of redemption to the holder of the mortgage expressly declares that the intention of the parties is that, unless the grantee elects, the deed shall not operate as a merger of title, the merger which might otherwise result will be prevented.² Thus, where it was declared that the deed was not to operate as a merger of the title of the mortgagee under the mortgage, "only at the election of the said" grantee, it was held that the two estates would, in equity, be preserved distinct, unless it appeared that the mortgagee elected that they should be merged.³

§ 1332. Comments.—As the law of merger depends mostly, if not entirely, upon the intention of the parties, it follows that when the parties express that intention, such expression of intention must be recognized by the courts. When such intention is not expressed, the court must endeavor to ascertain it by the circumstances connected with the transaction, or must indulge in some

¹ Crosby v. Chase, 17 Me. 369. Weston, C. J., in delivering the opinion of the court, said: "The certificate by the demandant, that payment had been made, may operate as a receipt, which is open to explanation. It is certainly not a paper of a higher character. The recital in the deed, that it was intended to cancel the mortgage and the notes, being accepted by the demandant, may conclude him from denying that fact. He does not now deny it, but avers truly that what was intended has failed, by reason of the prior attachment of the tenant. The supposed payment has become unavailable. He has not been permitted to realize the consideration, which he was to accept, instead of payment of the notes in money."

² Wilkes v. Collin, Law R. 8 Eq. 338; Bailey v. Richardson, 9 Hare, 734; Ætna Life Ins. Co. v. Corn, 89 Ill. 170; Tyrwhitt v. Tyrwhitt, 32 Beav. 244.

³ Spencer v. Ayrault, 10 N. Y. 202.

presumption by which *prima facie* its existence is to be determined. But, as was said in the chapter considering the principles by which deeds should be construed, the object of all rules is to determine what the intention of the parties was. There can be nothing for the courts to construe when the parties have themselves construed in unmistakable form their own acts. As a matter of conveyancing, it may be observed, it is highly desirable to express in language everything which, if left unexpressed, may become a matter of controversy.

§ 1333. **Quitclaim deed.**—Where a person, at the mortgagor's request, or with his consent, pays the amount due upon the mortgage, it is held that a quitclaim deed to such person from the mortgagee has the effect generally of an assignment of the mortgage, and does not operate as a discharge or release of the mortgage, unless this was the manifest intention of the parties.¹ But in Minnesota, it is held that a quitclaim deed without a transfer of the note and mortgage does not operate as an assignment of the mortgage.² But where the owner of land executes a mortgage, and then sells the mortgaged premises to another under an agreement that the grantee shall pay the notes secured, and the mortgagee executes to the grantee a quitclaim deed of the land, the mortgage is discharged.³

§ 1334. **Tenants in common.**—Where there are two or more tenants in common of the equity of redemption, a mortgage is not discharged by its assignment to one of them. The assignee may foreclose the mortgage. It is to his interest that it should be kept alive as a security for the payment of whatever amount may be due as a just proportion from his cotenant, and as he is under no

¹ *Hinds v. Ballou*, 44 N. H. 619; *Freeman v. McGaw*, 15 Pick. 82; *Wolcott v. Winchester*, 15 Gray, 461; *Hunt v. Hunt*, 14 Pick. 374; 25 Am. Dec. 400.

² *Johnson v. Lewis*, 13 Minn. 364.

³ *Jerome v. Seymour*, Har. (Mich.) 357.

obligation to his cotenant, the effect of the assignment will depend upon the assignee's interest. The cotenant cannot be injured because he can redeem by the payment of his share of the mortgage debt, and the assignee's interest in the equity of redemption does not preclude him from holding under the mortgage title.¹ Where land is subject to a mortgage, and one of the owners pays off the mortgage by installments, and upon the payment of the last installment the mortgage is assigned to him, a merger does not result so as to give the lien of a subsequent judgment creditor of the other tenant priority over the mortgage.²

§ 1335. Destruction of equitable estate.—When the equitable estate has been extinguished, there can be no merger. An owner of land subject to a judgment lien executed a mortgage on the land, and subsequently the premises were sold upon an execution issued under the judgment. The time for redemption having expired, the assignee of the certificate of sale received a deed from the sheriff, and then conveyed the premises to the mortgagee, who had never taken any steps to effect a redemption, and the mortgagee subsequently conveyed to another. In proceedings against the latter grantee by the creditors of the original owner, it was decreed that the grantee held the title in trust for the original owner, and both were directed to convey to a receiver. An action was then brought to foreclose the mortgage, but the court held that by a failure to redeem, the title was transferred to the purchaser and all inferior liens were extinguished, and that the mortgage could not be revived as a lien by the purchase by the mortgagee of the premises. The equitable estate of the mortgagee at the time of the purchase being gone, there could be no merger.³

¹ *Barker v. Flood*, 103 Mass. 474.

² *Duncan v. Drury*, 9 Pa. St. 332; 49 Am. Dec. 565.

³ *Hill v. Pixley*, 63 Barb. 200.

§ 1336. **Descent.**—Where a father who had given a mortgage on land to one of his children afterward died intestate, one-third of his interest passing to the mortgagee by inheritance, the mortgage held by such heir is not merged by the descent to him of the undivided one-third of the land.¹ But if a piece of land is charged with an annuity, and the person entitled to it inherits one-half of it as the heir at law of the devisee of the grantor of the annuity, it is held that by such descent one-half of the annuity becomes merged.² That is, the land is discharged from the payment of the annuity to the extent which the annuitant is entitled to as heir.³

§ 1337. **Deed for part of land.**—If a mortgagee purchases an undivided part of the mortgaged premises, and it does not appear that there is a payment or merger of the mortgage or any portion of it, the deed may have the effect of releasing from the operation of the mortgage the portion conveyed, leaving the portion unconveyed solely subject to the lien of the mortgage. The registration of the mortgage is notice to a subsequent mortgagee of the portion unconveyed, and he takes subject to the lien of the first mortgage.⁴ If in a case of this kind, the subsequent mortgage is foreclosed, but the prior mortgagee is not made a party, nothing being said in the bill about the prior mortgage, a judgment in the action is not a bar to a suit by the prior mortgagee to foreclose, although he knew of the judgment and did not attempt to have it modified or vacated, when it is not shown that he was present at the sale under the judgment or knew of the manner of making the sale.⁵

¹ *Thebaud v. Hollister*, 37 N. J. Eq. 402. See *Carithers v. Stuart*, 87 Ind. 424.

² *Jenkins v. Van Schaak*, 3 Paige, 242.

³ *Addams v. Heffernan*, 9 Watts, 529. See, also, *Fitzgerald v. Fitzgerald*, Law R. 2 P. C. 83; *Byam v. Sutton*, 19 Beav. 556.

⁴ *Smith v. Roberts*, 91 N. Y. 470; 62 How. Pr. 196.

⁵ *Smith v. Roberts*, 91 N. Y. 470; 62 How. Pr. 196.

§ 1338. **Two mortgages.**—Where land subject to two mortgages is conveyed to a party, and the grantee afterward purchases and has assigned to him the senior notes and mortgage, a merger results, the junior mortgage becoming the first lien. Hence, the grantee cannot maintain an action to compel the junior mortgage holder to redeem from the first mortgage.¹

§ 1339. **Possession by mortgagee.**—Although the possession of the mortgaged premises may have been delivered by the mortgagor to the mortgagee, and the land is held by the grantee of the mortgagee, yet if after the delivery of possession to the mortgagee he transfers the note, the indorsee may obtain judgment upon the note alone, and if execution is issued and levied upon the mortgaged premises, the mortgage is extinguished.²

§ 1340. **Prior assignee.**—Where a mortgagee has assigned the notes and mortgage to a *bona fide* purchaser, a subsequent deed from the mortgagor to the mortgagee cannot cause a merger so as to affect the rights of the assignee. If the assignment of the mortgage is recorded, a purchaser from the mortgagee, after the mortgagor's release of his equity of redemption, will take a title subject to the equitable claims of the assignee. After the assignment of the mortgage, the mortgagee ceased to be such, so that the two titles could not unite in the same person.³

§ 1341. **Mortgage in trust for married woman.**—If the trustee does not consent, a mortgage in trust for the separate estate of a married woman is not extinguished by the execution of a deed to her of the mortgaged premises. A husband who was indebted to his wife for money from her separate estate, executed a mortgage on real estate belonging to him to a trustee in trust for her, and a

¹ Byington v. Fountain, 61 Iowa, 512. But see under the facts of the case the decision in Spurgin v. Adamson, 62 Iowa, 661.

² Lord v. Crowell, 75 Me. 399.

³ International Bank of Chicago v. Wilshire, 108 Ill. 143.

few days later gave a judgment to his partner as security. Subsequently both husband and wife executed a deed of the mortgaged premises, subject to the mortgage to A, and he shortly afterward executed a deed of the same land to the wife on the same terms, and the husband and wife then joined in a mortgage to B, as security for money borrowed by the husband, B, at the same time, taking an assignment from the trustee of the wife's mortgage and a release from the partner of the priority of his lien. The land having been sold under the trustee's mortgage, the deed to the wife of the mortgaged premises was held not to extinguish the mortgage which the trustee held in trust for her, the trustee not being a party to it, an intent to keep the mortgage in existence appearing upon the face of the deed, and this result was for her interest.¹ Where a trustee holds land in trust for a married woman, and, on paying a mortgage on the land, given by her and her husband before the trust deed to him, has the mortgage assigned to him, and, subsequently, in compliance with her request, conveys the land subject to the mortgage, and assigns the mortgage at the same time to the grantee, no merger of the mortgage in the trustee's interest results, and hence, judgments recovered against him prior to his conveyance of the land are not liens on it.²

§ 1342. Reliance upon record.—As has been explained, the question of merger is one determined in a great measure by the intention of the parties. Reliance cannot be placed upon the record for the purpose of showing merger.³ A party who takes a deed upon the assump-

¹ Hatz's Appeal, 40 Pa. St. 209.

² Denzler v. O'Keefe, 34 N. J. Eq. (7 Stewt.) 361. Where a deed is executed by the mortgagor to the mortgagee, and the latter, at the same time and as part of the same transaction, executes a deed to the wife of the mortgagor, the deeds being made without consideration and for the sole purpose of conveying the title to the wife, the mortgage is not merged in the title acquired by the mortgagee, and is not extinguished: McCrory v. Little, 136 Ind. 86.

³ Oregon and Washington Trust Investment Co. v. Shaw, 5 Saw. 336; Purdy v. Huntington, 42 N. Y. 334; 1 Am. Rep. 532; Aiken v. Milwaukee

tion that there has been a merger of a former mortgage to his grantor, in a subsequent conveyance of the land, acts at his own peril. He has notice that some one holds the mortgage as an existing lien, and, unless the mortgagee is still the owner of the mortgage, the grantee takes subject to it.¹ In a case in Wisconsin the court considered the question of merger, quoting with approval the language of the Master of the Rolls, Sir William Grant, that the question is "upon the intention, actual or presumed, of the person in whom the interests are united," and adds: "Such being the law, it seems very clear that it was the duty of the trustees, if they desired that the trust deed should be unaffected by the plaintiff's mortgage, to go beyond the record in the register's office (for such record was notice to them of the mortgage), and to ascertain from other sources whether there had been a merger in fact. They should have required their grantor (if it could) to produce the mortgage and the note which it was given to secure, and to deliver them up, or, at least, to produce the securities and discharge the mortgage of record. The inability of the grantor to do so would be sufficient to charge the trustees with notice that the security had been assigned, and the failure to call upon the grantee to do so is sufficient to charge them with laches. Briefly stated, the case seems to be this: When the trust deed was executed, under which the appellant makes its title to the land in controversy, the plaintiff's mortgage was of record in the proper office, and the trustees had, at least, constructive notice of its existence. There was nothing of record to show that the debt which it was given to secure had been paid, and nothing which could affect the mortgage, except the registry of the conveyance to the mortgagee of the equity of redemption. The record did not show whether such conveyance operated as a

& St. Paul R. R. Co., 37 Wis. 469; Worcester Nat. Bank v. Cheeney, 87 Ill. 602; Morgan v. Hammett, 34 Wis. 512; Chase v. Van Meter, 140 Ind. 321; 39 N. E. Rep. 455.

¹ Oregon and Washington Trust Investment Co. v. Shaw, 5 Saw. 336.

merger of the mortgage interest in the land, or otherwise. Further investigation was necessary to determine that fact, and the means of determining it were at hand. The trustees failed to push their inquiries beyond the registry. They failed to ascertain (as they easily might have done) whether the two estates were, in fact, united in their grantor, and if so, whether the latter elected to preserve the mortgage interest. Using no diligence in that behalf, they took their conveyance at their peril of the fact. It turns out that there has been no merger; that the mortgage interest is still subsisting, and because of priority of execution and registry, such interest is paramount to that of the appellant in the mortgaged premises.”¹ If a mortgagee assigns the mortgage, and if subsequently the mortgagor conveys the mortgaged estate to the mortgagee, the assignee of the mortgage has a valid lien on the property as against a person purchasing from such mortgagee, without knowledge of the assignment. The fact that, prior to the registration of the assignment, the conveyances to the mortgagee, and from him to the purchaser, were both placed on record, cannot alter this rule. The records can only show what was done. They cannot show what the parties intended when not expressed. The assignee stands in the place occupied by the mortgagee at the time of the assignment. If the mortgage was a valid lien at that time, it does not lose its validity because subsequently the mortgagor conveys the property to the mortgagee. A purchaser cannot assume without inquiry that the mortgage has been satisfied.² Mr. Justice Sutherland said that independently of the recording act, it would be wholly immaterial whether the purchaser had or had not notice of the mortgage, or whether the deed to the purchaser was voluntary, or for a valuable consideration. “Is this not too plain to require an illustration? A sells and conveys land to B. B gives back a bond and mortgage for the purchase money. A sells and assigns the

¹ *Aiken v. Milwaukee & St. Paul R. R. Co.*, 37 Wis. 469, per Lyon, J.

² *Purdy v. Huntington*, 42 N. Y. 334; 1 Am. Rep. 532.

bond and mortgage to C, and afterward receives a conveyance of the equity of redemption from B, and then by a full covenant deed, conveys the land and all his estate and interest in the land to D. Now, the conveyances, and the bond and mortgage, and their assignment, being left to their common-law force and effect, does not D, irrespective of any recording act, necessarily take his conveyance subject to C's mortgage? *Could* A convey to D any more than the equity of redemption? Could his conveyance to D impair, or in any way affect, C's mortgage debt, or mortgage security? Or is there, or can there be, independent of the recording act, as between C and D, any material question of good faith, or of notice, or even as to the consideration of D's conveyance? Is it, or can it be at all, material as between C and D, irrespective of the recording act, whether D did or did not pay a valuable consideration for his conveyance, or whether he had, or had not notice of C's mortgage? Of course not. It is almost absurd to state these questions; and certainly, their statement furnishes their answers. Nay, further, no ingenious use of words, or plausible suppositions, or imperfect and deceptive analogies, can show, with the recording act in full force and in view, that A's conveyance to D did, or could, in fact, *of itself or by itself*, carry or convey anything but the equity of redemption, for he in fact had nothing else to convey, and it is even beyond legislative power, however omnipotent, to enable a person to actually convey that which he has not. And of course, A's deed to D did not, and could not, of itself or by itself, as *the act or deed of A merely*, with or without the recording act, operate as an assignment of C's bond or mortgage, his mortgage debt, or mortgage security, lien, or interest in the land."¹

§ 1343. **Married women.**—Where statutes protecting the rights of married women prevail, the marriage of a woman with the mortgagor does not extinguish a mort-

¹ Purdy v. Huntington, 42 N. Y. 334, 345; 1 Am. Rep. 532.

gage held by her before marriage.¹ Nor under such statutes is an assignment of a mortgage to the wife of the mortgagor a discharge of the lien.² A mortgagor may purchase a mortgage executed by himself and wife on property belonging to her. It is a valid security in the hands of the mortgagor, as well as in the hands of an assignee. It cannot be declared satisfied in the hands of the assignee, because the consideration was paid by the mortgagor, and that the assignee held the mortgage for the use of the mortgagor.³

§ 1344. **Deed to sureties.**—An owner of land executed a mortgage to A and B to indemnify them against liability on a note made by the owner to a bank, the mortgage containing a power of sale to be exercised by the mortgagees, or the survivor, or his representatives, upon default, for breach of the condition which included the payment of the note by the principal to the holder. The mortgagor subsequently executed a quitclaim deed to A and B, and they executed a bond for reconveyance within a specified time upon the performance of certain conditions, but the mortgagor never complied with the conditions of the bond which was not recorded. The quitclaim deed, however, was placed on record, as was also the mortgage, which by the original agreement of the parties was delivered to the bank. Several portions of the mortgaged premises were afterward sold with warranty. Some of these sales were authorized by the bank, and others were assented to after they had been made. But in all cases payment of sums in sufficient amount upon the mortgage were made to the bank, upon which payment receipts were given. A died first, and after B's death his administrator paid one-half of the amount due on the note, upon the agreement that it was to be "in full payment of claim on said note, provided the balance due

¹ *Power v. Lester*, 23 N. Y. 527. See *Gillig v. Maass*, 28 N. Y. 191.

² *Bemis v. Call*, 10 Allen, 512; *Model Lodging House Association v. Boston*, 114 Mass. 133; *Bean v. Boothby*, 57 Me. 295.

³ *Faulks v. Dimock*, 27 N. J. Eq. 65.

on the note be paid by estate of A, or by anyone for said estate or for themselves," the balance, however, not being paid. A bill in equity was filed to have the mortgage declared of no validity, and to enjoin B's administrator from selling the mortgaged premises to pay the balance still due. The fact was, as the court found, that the quitclaim deed was not intended by the parties to cause a merger of title, and hence the bill was held not to be maintainable.¹

§ 1345. Payment by party bound.—Where an assignment after payment is made to a party bound by contract to pay the debt, the debt is generally held to be discharged. The rule is thus stated: "If the money is advanced by one whose duty it is, by contract or otherwise, to pay and cancel the mortgage, and relieve the mortgaged premises of the lien, a duty in the proper performance of which others have an interest, it shall be held to be a release, and not an assignment, although in form it purports to be an assignment. When no such controlling obligation or duty exists, such an assignment shall be held to constitute an extinguishment or an assignment, according to the intent of the parties; and their respective interests in the subject will have a strong bearing upon the question of such intent."² Where payments are made

¹ *Aldrich v. Blake*, 134 Mass. 582. "When so definite and important an interest," said Devens, J., "had been created in the mortgage in favor of the bank, there could be no union of titles which could operate to exclude it by the act of the mortgagor and mortgagees, or their assigns. There was a trust created in its favor as the payee of the note, which was imposed upon the sureties, Otis D. and Warren J. Ballou, and they held the mortgaged property subject to this trust. It being clearly expressed in the mortgage, when this was recorded, constructive notice of its existence was given to all, so that attaching creditors, even if they found that there had been a subsequent quitclaim deed of the granted premises to the mortgagees, would be fully informed that they would of necessity hold them subject thereto."

² *Brown v. Lapham*, 3 Cush. 551. See *Bemis v. Call*, 10 Allen, 512; *Strong v. Converse*, 8 Allen, 557; 85 Am. Dec. 732; *Butler v. Seward*, 10 Allen, 466; *Burnham v. Dorr*, 72 Me. 198; *Wadsworth v. Williams*, 100 Mass. 126; *Ryer v. Gass*, 130 Mass. 227; *Lappen v. Gill*, 129 Mass. 349.

by a party in pursuance of his duty, they must be applied as payments, and cannot be claimed by such party as a part consideration for the assignment of the mortgage to another.¹ When land is subject to a mortgage, a purchaser who has assumed and agreed to pay the mortgage, pays and discharges the mortgage, when he takes an assignment of it, so far as the liability of his grantor is concerned.²

§ 1346. Covenant against encumbrances. — Where land is sold with a covenant of warranty against encumbrances, the grantor, in case he takes an assignment of a mortgage outstanding on the same land, holds it for the benefit of the grantee.³ The grantor acquires title not merely by way of estoppel against the grantor, but as a positive confirmation of his title. The subsequent purchase by the grantor is presumed to have been made in the performance of his duty to the grantee to perfect his title, and this presumption is incontrovertible. If, after

¹ *Burnham v. Dorr*, 72 Me. 198. And see, *Johnson v. Webster*, 4 De Gex, M. & G. 474; *Otter v. Vaux*, 2 Kay & J. 650; 6 De Gex, M. & G. 638. Where land is bought by a partnership, assuming the payment of a mortgage on it, and the mortgage is foreclosed for nonpayment, a purchase at the mortgage sale by one of the partners will not entitle him to a deed. His purchase is only a satisfaction of the mortgage: *Freeman v. Moffitt*, 119 Mo. 280.

² *Putman v. Collamore*, 120 Mass. 454; *Mickles v. Townsend*, 18 N. Y. 575; *Tucker v. Crowley*, 127 Mass. 400; *Winans v. Wilkie*, 41 Mich. 264; *Frey v. Vanderhoos*, 15 Wis. 397; *Thompson v. Heywood*, 129 Mass. 401; *Russell v. Pistor*, 7 N. Y. 171; 57 Am. Dec. 509; *Willson v. Burton*, 52 Vt. 394; *Coles v. Appleby*, 22 Hun, 72; *Burnham v. Dorr*, 72 Me. 198; *Lilly v. Palmer*, 51 Ill. 331. And see *Hall v. Harrington*, 41 Mich. 146; *Campbell v. Knights*, 24 Me. 332; *Strong v. Converse*, 8 Allen, 547; 85 Am. Dec. 732; *Pike v. Goodenow*, 12 Allen, 472; *Dollar Savings Bank v. Burns*, 87 Pa. St. 491. And see *Atkinson v. Angert*, 46 Mo. 515; *McCabe v. Swap*, 14 Allen, 188; *McMahon v. Russell*, 17 Fla. 698; *Norris v. Morrison*, 45 N. H. 490; *Russell v. Austin*, 1 Paige, 192; *Savage v. Hall*, 12 Gray, 363; *Hartshorne v. Hartshorne*, 2 N. J. Eq. (1 Green) 349; *Farwell v. Cotting*, 8 Allen, 211; *Gibson v. Orehore*, 3 Pick. 474; *Jones v. Bragg*, 33 Mo. 337; 84 Am. Dec. 49; *Sargeant v. Fuller*, 105 Mass. 119.

³ *Mickles v. Townsend*, 18 N. Y. 575; *Collins v. Torrey*, 7 Johns. 278; 5 Am. Dec. 273.

the grantor has thus taken an assignment of a mortgage, he assigns it to another, the latter takes it subject to all equities that exist between the grantee and grantor. In other words, the purchaser acquires no lien on the land. It is the purchaser's duty, when the grantee is in possession, or his deed is recorded, to ascertain the equities of the grantee.¹ Where the same person has executed two mortgages upon the same land to different mortgagees with covenants of warranty, a redemption of the first mortgage cannot give the mortgagor the position of an equitable assignee.²

¹ *Mickles v. Townsend*, 18 N. Y. 575.

² *Butler v. Seward*, 10 Allen, 466. See, also, *Tyler v. Lake*, 4 Sim. 351; *Stoddard v. Rotton*, 5 Bosw. 378; *Fish v. Gordon*, 10 Vt. 288; *Tucker v. Crowley*, 127 Mass. 400.

CHAPTER XXXVIII.

TAX DEEDS.

- § 1347. Scope of chapter.
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- § 1349. Rule of caveat emptor.
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- § 1422. Deed as conclusive evidence.
- § 1423. Illegal sale.
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§ 1347. Scope of chapter.—It was our intention originally to treat of nothing but the voluntary alienation of title. But questions involving the requisites of tax deeds come so frequently before the courts, that it seemed desirable, in a treatise devoted to a discussion of the law

of deeds, some attention should be given to this subject. It would be impracticable to enter into an exhaustive treatment of the law of taxation, or of all the matters resulting eventually in a sale of land for taxes, and the issuance, after the expiration of the statutory time for redemption of a deed. The validity of a tax deed depends, to a great extent, upon the regularity of antecedent proceedings, the assessment, listing, and other matters required by law, before the tax levy is actually made. An exhaustive or even a cursory examination of such matters would require more space than could be devoted to them in a treatise not confined to a consideration of the law of taxation alone. In this chapter the important principles applicable to the tax deed as an instrument of conveyance, and the method and requisites of a tax sale, are discussed in such a manner as seemed proper in a treatise involving originally the law of a voluntary transfer of title. For other questions connected with the exercise of the power of taxation, reference should be had to the many valuable works, confined exclusively to a consideration of that subject. Therefore, in this chapter we shall treat of the deed itself, and of such matters only as are intimately connected with it.

§ 1348. Validity dependent upon antecedent proceedings.—A tax deed, as a general proposition, depends upon the regularity and correctness of the proceedings leading up to it. Aside from some positive provision of the statute, there is no presumption that the requirements of the law in relation to the assessment, levy, and collection of taxes have been complied with. Even where by statute the recitals of the deed are made *prima facie* evidence of the facts recited, yet when it is shown that there has been a failure to comply with some essential step in the proceedings, the *prima facie* character of the deed is overthrown.¹ Where a city lot, owned and occupied as

¹ Bidleman v. Brooks, 28 Cal. 72; Rayburn v. Kuhl, 10 Iowa, 92; Fitch v. Casey, 2 Greene G. 300; Johnson v. Elwood, 53 N. Y. 435; Sib-

a single lot, is in the assessment arbitrarily divided, one part being assessed to the owner and another part to unknown owners, the assessment to the unknown owners is illegal. The illegality of the assessment overthrows the *prima facie* evidence of title supplied by the recitals of the tax deed, made under a sale of property assessed in this manner.¹ "The assessor is nowhere authorized," said Mr. Justice Sawyer, "to arbitrarily divide up lots in strips to suit his caprice, and assess such several portions separately. If he may divide up a lot of well-known boundaries into strips twenty feet wide, he may divide it into strips of one foot in width, or even smaller dimensions, and assess each separately, and thus render it not only greatly inconvenient and oppressive to the owner, but almost impossible for him to ascertain whether his taxes have all been paid or not. The law undoubtedly contemplates that each lot of well-known dimensions and boundaries shall be assessed as one lot. In this instance, there was a lot of the ordinary dimensions—the smallest of the lots as originally officially surveyed and platted in that part of the city—which had not been subdivided by the owner. It was enclosed by a single fence, separating it distinctly from all other lands, and had a dwelling-house and outbuildings upon it, the whole

ley v. Smith, 2 Mich. 486; Orton v. Noonan, 25 Wis. 672; Delaplaine v. Cook, 7 Wis. 44; Graves v. Bruen, 11 Ill. 431; Ray v. Murdock, 36 Miss. 692; Biscoe v. Coulter, 18 Ark. 423. See People v. Doe, 31 Cal. 220; Norris v. Russell, 5 Cal. 249.

¹ Bidleman v. Brooks, 28 Cal. 72. It is held that conferring power to levy taxes and sell land for nonpayment of taxes does not carry with it power to convey the land after the sale, but the power to execute a deed must be expressly given: Knox v. Peterson, 21 Wis. 247; Smith v. Todd, 55 Wis. 459; Doe v. Ohunn, 1 Blackf. 336. See, also, Sibley v. Smith, 2 Mich. 487. But see Farrar v. Eastman, 5 Me. 345; Bruce v. Schuyler, 9 Ill. 221; 46 Am. Dec. 447. While the matter is generally provided for by statute, the general rule is that the officer who made the sale cannot execute a deed after the expiration of his term of office, but the deed should be made by the one holding the office at the time at which the deed should be made: Donnell v. Bellas, 34 Pa. St. 157; Hoffman v. Bell, 61 Pa. St. 444; Den v. Allen, 67 N. C. 346; Cuttle v. Brockway, 32 Pa. St. 45.

openly and notoriously occupied as a single lot or messuage by the defendant's tenant and his family. Yet it was arbitrarily sliced up into at least three parts, and each separately assessed as a distinct lot, the larger portion—more than half—being assessed to the real owner, the defendant, and the other two parcels to unknown owners. Such an assessment of a tract of land constituting one well-known lot, and actually occupied as such—if it would not necessarily have such an effect—would be very likely to mislead the owner, and result, as in this instance, in a sale of his property. The owner calls to pay his taxes. A list of all the taxes against him is furnished. Upon looking it over he finds a lot in a certain locality taxed to him, and without scrutinizing the boundaries very closely, he naturally concludes that the whole lot is assessed to him, as it should be, pays his taxes, and rests in security, till several years afterward he finds that a small strip has been, in fact, assessed to unknown owners, and without his knowledge or fault, sold. Such would be the inevitable result if such a system of assessment were tolerated. The object of levying taxes is to secure revenue for the purposes of the government, and not by deceptive assessments to entrap the unwary into the loss of their lands. In cases where it is difficult to ascertain whether a tract of land has been divided into smaller lots or not, it might not be proper to scrutinize the acts of the assessor too rigidly, if it can be seen that no injury could result; but the assessment of a single lot notoriously occupied as this was, the greater part to the owner, and smaller portions to unknown owners, is a gross violation of both the letter and the spirit of the law, and, if upheld, would lead to great abuses and injustice. It is, to our minds, highly probable that the assessment in question did, in fact, mislead the defendant, and that the sale of the property was the result of this misapprehension. At all events, he was liable to be thus misled to his injury. The assessment being illegal, the *prima facie* case made by the tax deeds, conceding them to be sufficient in form,

is overthrown."¹ All the various acts required to be performed must be complied with before the title will pass. All of the provisions of the statute must be strictly observed.²

¹ In *Bidleman v. Brooks*, 28 Cal.

² *Pope v. Hedden*, 5 Ala. 433; *Taylor v. French*, 19 Vt. 49; *Morris v. Crocker*, 4 La. 147; *Judevine v. Jackson*, 18 Vt. 470; *Millikan v. Patterson*, 91 Ind. 515; *Lessee of Perkins v. Dibble*, 10 Ohio, 433; 36 Am. Dec. 97; *Brown v. Dinsmoor*, 3 N. H. 103; *Carlisle v. Longworth*, 5 Ohio, 229; *Ronkendorff v. Taylor*, 4 Peters, 349; *Langdon v. Poor*, 20 Vt. 13; *State v. Mayor etc.*, 36 N. J. L. 191; *Irving v. Brownell*, 11 Ill. 402; *Brooks v. Rooney*, 11 Ga. 427; 56 Am. Dec. 430; *Early v. Doe*, 16 How. 610; *Foust v. Ross*, 1 Watts & S. 501; *Matthews v. Light*, 32 Me. 305; *O'Brien v. Coulters*, 2 Blackf. 421; *Lane v. Bommelmann*, 21 Ill. 143; *McDonough v. Gravier*, 9 La. 546; *Lake County v. Sulphur Bank etc. Co.*, 66 Cal. 17; *Lagroue v. Rains*, 48 Mo. 536; *Williams v. Peyton*, 4 Wheat. 77; *Hill v. Leonard*, 4 Scam. 140; *Lyon v. Hunt*, 11 Ala. 295; 46 Am. Dec. 216; *Wilsons v. Bell*, 7 Leigh, 22; *Carpenter v. Sawyer*, 17 Vt. 121; *Burch v. Fisher*, 13 Serg. & R. 208; *Dentler v. State*, 4 Blackf. 258; *Carmichael v. Aikin*, 13 La. 205; *Gaylord v. Scarff*, 6 Clarke, 579; *Abbott v. Doling*, 49 Mo. 302; *Yankee v. Thompson*, 51 Mo. 237; *Schenck v. Peay*, 1 Woolw. 175; *Alvord v. Collin*, 20 Pick. 418; *Holbrook v. Dickinson*, 46 Ill. 285; *Jackson v. Shepard*, 7 Cowen, 88; 17 Am. Dec. 502; *Boisgerard v. Johnson*, 23 Miss. 122; *Charles v. Waugh*, 35 Ill. 315; *Adriance v. McCafferty*, 2 Rob. (N. Y.) 153; *Sumner v. Sherman*, 13 Vt. 609; *Porter v. Whitney*, 1 Greenl. 306; *Bishop v. Loran*, 4 Mon. B. 116; *Brown v. Veazie*, 27 Me. 295; *Isaacs v. Wiley*, 12 Vt. 677; *Nalle v. Fenwick*, 4 Rand. 585; *Thames Manuf. Co. v. Lathrop*, 7 Conn. 550; *Shimmin v. Inman*, 26 Me. 228; *Yancy v. Hopkins*, 1 Munf. 419; *Scales v. Alvis*, 12 Ala. 617; 46 Am. Dec. 269; *Doughty v. Hope*, 3 Denio, 595; *Smith v. Bodfish*, 27 Me. 295; *Varick v. Tallman*, 2 Barb. 113; *Fitch v. Casey*, 2 Greene G. 300; *Blake-ney v. Ferguson*, 3 Eng. 277; *Bussey v. Leavitt*, 3 Fairf. 378; *Fitch v. Pinckard*, 4 Scam. 69; *Greene v. Lunt*, 58 Me. 532; *Thatcher v. Powell*, 6 Wheat. 119; *Garrett v. Wiggins*, 1 Scam. 335; *Brady v. Offut*, 19 La. Ann. 184; *Hubbell v. Weldon*, Hill & D. 13; *Graves v. Bruen*, 11 Ill. 437; *Yeuda v. Wheeler*, 9 Tex. 408; *Hadley v. Tankersley*, 8 Tex. 12; *Altes v. Hinckler*, 36 Ill. 265; 85 Am. Dec. 406; *Davis v. Farnes*, 26 Tex. 296; *Young v. Martin*, 2 Yeates, 312; *Morton v. Reed*, 6 Mo. 74; *Farnum v. Buffum*, 4 Cush. 267; *Register v. Bryan*, 2 Hawks, 17; *Parker v. Rule*, 9 Cranch, 64; *Keene v. Houghton*, 19 Me. 368; *Hobbs v. Clements*, 32 Me. 67; *Cushing v. Longfellow*, 26 Me. 306; *Matthews v. Light*, 32 Me. 305; *Richardson v. Dorr*, 5 Vt. 9; *Taylor v. French*, 19 Vt. 49; *Brown v. Smith*, 1 N. H. 36; *Chandler v. Spear*, 22 Vt. 388; *Delogny v. Smith*, 3 La. 418; *Spear v. Ditty*, 8 Vt. 419; *Jackson v. Esty*, 7 Wend. 148; *Mason v. Fearson*, 9 How. 248; *Wistar v. Kammerer*, 2 Yeates, 100; *Isaacs v. Shattuck*, 12 Vt. 668; *Hall v. Collins*, 4 Vt. 316; *Culver v. Hayden*, 1 Vt. 359; *Bellows v. Elliott*, 12 Vt. 569; *Carpenter v. Sawyer*, 17 Vt. 121;

§ 1349. **Rule of caveat emptor.**—The rule of *caveat emptor* applies strictly to a purchaser at a tax sale. If the assessment is so defective that the purchaser acquires no title at the tax sale, he cannot maintain an action against the county for the recovery of the amount paid by him.¹ An agreement made at the time the sale occurs by the board of supervisors of a county to refund the money paid in case the sale should prove defective, is void. Such an agreement is *ultra vires*.² In a case in Maryland, the city collector of Baltimore sold a house and lot for the nonpayment of a tax. The purchaser paid the money, received a deed from the collector, and entered into possession. Subsequently the owner recovered the property, on the ground that the required notice had not been given. The purchaser brought an action to recover damages from the collector, but the court held that it was his duty to inquire whether or not the collector in selling the property had acted in conformity with law.³

Brown v. Wright, 17 Vt. 97; 42 Am. Dec. 481. The abbreviation "dolls." is equivalent to the word "dollars" in an assessment: *Salisbury v. Shirley*, 66 Cal. 223.

¹ *Loomis v. County of Los Angeles*, 59 Cal. 456; *McWhinney v. City of Indianapolis*, 98 Ind. 182; *City of Logansport v. Humphrey*, 84 Ind. 467.

² *Hyde v. Supervisors*, 43 Wis. 129; *City of Logansport v. Humphrey*, 84 Ind. 467.

³ *Hamilton v. Valiant*, 30 Md. 139. Mr. Justice Brent, in delivering the opinion of the court, said: "Although cases are numerous in which titles derived from tax sales have been declared to be defective because of irregularities, we know of no case in which the attempt has been made to hold the officer making the sale responsible in damages. There seems to have been a general acquiescence in the doctrine that no such liability exists, and we had not supposed that any doubt was entertained upon so plain a proposition. A purchaser at a tax sale buying, as he does, property from a person who is not the owner of it, comes strictly and rigidly within the rule of *caveat emptor*. While his title mainly depends upon the regularity of the proceedings of the officer who makes the sale, he is bound to inquire whether he has acted in conformity with the law from which his power is derived. In this case the duties of the collector as to notice and other matters essential to the validity of a tax sale were distinctly prescribed, and in regard to them a purchaser had the easy means of being fully informed. If he acted without proper inquiry and care, it was his own fault, and, buying upon the faith of his own judgment, he

§ 1350. **Purchase not a contract.**—In all the proceedings for the collection of taxes, no element of contract, agreement, or consent enters. The proceeding is one *in invitum*. The taxpayer remains passive and consents to nothing. He has a right to demand that for each step taken by the officers full authority shall be shown. If a tax deed is void for the reason that there is a patent ambiguity in the description of the land, the purchaser cannot come into a court of equity to have the assessment-roll rectified, for the purpose of charging the land with a lien for the taxes paid by him in the purchase deed afterward, on the ground that the description was founded upon the list returned to the assessor by the owner, and that such return was equivalent to an agreement that the land should be assessed by that description, and that the error in the description was caused through the fraud, mistake, or ignorance of the owner.¹ In a case in Massachusetts, Mr. Justice Hoar very clearly states the rule: "There is a plain distinction between the right of a person to recover from the town the amount of a tax unlawfully assessed upon him, and the claim of the purchaser, under a collector's deed, whose title proves defective. The town is not a party to the deed. The purchaser

must abide the consequences. The law is well settled that all the acts and proceedings *in pais* of an officer selling land for taxes form an important element in the title of the purchaser. His deed depends for its validity upon proof that the requisites of the law, subjecting it to be sold for taxes, have been complied with. A party claiming under such a deed is as much bound to prove them as he would be any matter of record on which his title depends. He is required to preserve the evidence of them as he would any other muniment of title, and cannot be regarded in law as without fault and without laches if he fails to examine into their regularity before he becomes a purchaser. The appellant either became the purchaser of the property in question, with a knowledge that the appellee had failed in the proper discharge of his duty by the omission to give the required notice, or was himself guilty of negligence in buying without inquiry and examination. In either aspect he will not be regarded in law as an innocent sufferer, blameless of having brought upon himself by want of proper care and diligence, the very wrong of which he complains." See, also, *Casselbury v. Piscataway*, 43 N. J. 353; *Sullivan v. Davis*, 29 Kan. 28.

¹ *Cogburn v. Hunt*, 56 Miss. 718.

is a mere volunteer in the payment of the tax. He has the same means of knowing whether it is legally assessed that the town has. He buys a title without warranty, except such covenants as he takes from the collector, and he must rely only upon them. Beyond those covenants, his deed is in the nature of a mere quitclaim, for which he has paid what he thought the chance was worth. His speculation may prove very profitable, or wholly unproductive; but no one has taken his property without his consent, or with any contract, express or implied, to reimburse him if his bargain proves a losing one. Where there is no fraud or imposition, the sale of land without warranty creates no obligation to return the purchase money in any event."¹

§ 1351. **Statutory regulation.**—If the purchaser secures no title, he has no remedy unless given one by statute. In Indiana, if the tax title proves to be defective on account of an imperfect description, the purchaser has a lien for the sum paid.² In Michigan, the purchaser, in some cases where the title proves defective, may receive the amount of his bid back; but this right is construed strictly.³ The purchaser is allowed a lien in Iowa if the tax deed is canceled on the ground of being made without authority.⁴ In Ohio, in certain cases, a purchaser at a tax sale, where the assessment is invalid by reason of a defective description of the land, may bring an action against the owner for the amount of the taxes, interest, and penalties due at the time of the sale, subsequently accruing interest, and all legal taxes paid by him

¹ In *Lynde v. Inhabitants of Melrose*, 10 Allen, 49. And see *Jenks v. Wright*, 61 Pa. St. 410; *Coxe v. Deringer*, 78 Pa. St. 271.

² *Sloan v. Sewell*, 81 Ind. 180; *Peckham v. Millikan*, 99 Ind. 352; *Cooper v. Jackson*, 71 Ind. 244; *Parker v. Goddard*, 81 Ind. 294.

³ *People v. Auditor General*, 30 Mich. 12.

⁴ *Orr v. Travacier*, 21 Iowa, 68. See *Claussen v. Rayburn*, 14 Iowa, 136; *Early v. Whittingham*, 43 Iowa, 168; *Brown v. Painter*, 44 Iowa, 368; *Thompson v. Savage*, 47 Iowa, 522. In case of fraud, see *Ellis v. Peck*, 45 Iowa, 112; *Van Shaack v. Robbins*, 36 Iowa, 201.

afterward.¹ In Mississippi, the land is charged in equity, with the amount paid by the purchaser.² When a purchaser has the right to have his money refunded in case the sale proves to be void, a statute passed subsequently to the purchase cannot affect his right.³ In effect, a purchase at a tax sale is a contract between the State and the purchaser, the law in force at the time the sale is made containing its terms.⁴

§ 1352. Advertisement of sale.—A tax sale is not valid unless notice is given in the manner required by statute.⁵ Where a statute prescribes that the advertisement shall specify “the time and place of sale,” and “the name of the person as whose property it was taxed,” an advertisement which fails to state that the land was assessed as a person’s property, or that he was chargeable with the taxes thereon, will render a tax deed subsequently made void. The tax deed may be vacated.⁶

¹ *Chapman v. Sollars*, 38 Ohio St. 378. But in *Johnson v. Stewart*, 29 Ohio St. 498, it was held that he could not recover a penalty.

² *Cogburn v. Hunt*, 56 Miss. 718; *Meeks v. Whatley*, 48 Miss. 337. See, also, *Miller v. Hurford*, 11 Neb. 377; *Petit v. Black*, 8 Neb. 52; *Reed v. Merriam*, 15 Neb. 323.

³ *Fleming v. Roverud*, 30 Minn. 273.

⁴ *State v. Foley*, 30 Minn. 350.

⁵ *Elliott v. Edins*, 24 Ala. 508; *Parker v. Rule’s Lessee*, 9 Cranch, 64; *Pope v. Headen*, 5 Ala. 433; *Pitts v. Book*, 15 Tex. 453; *Williams v. Peyton*, 4 Wheat. 77; *St. Anthony etc. Co. v. Greely*, 11 Minn. 321; *Early v. Doe*, 16 How. 610; *State v. Mayor*, 36 N. J. L. 288; *Minor v. Natchez*, 4 Smedes & M. 602; 43 Am. Dec. 488; 10 Smedes & M. 246; *Nalle v. Fenwick*, 4 Rand. 594; *Miles v. Walker*, 4 Mich. 641; *Bidwell v. Webb*, 10 Minn. 59; 88 Am. Dec. 56; *Moulton v. Blaisdell*, 24 Me. 283; *Thompson v. Gotham*, 9 Ohio, 170; *Styles v. Weir*, 26 Miss. 187; *Garrett v. Wiggins*, 1 Scam. 335; *Jenks v. Wright*, 61 Pa. St. 410; *Fitch v. Pinckard*, 4 Scam. 69; *Brown v. Veazie*, 25 Me. 359; *Rafferty’s Heirs*, 5 Ham. 457; *Hughey v. Horrel*, 2 Ham. 232; *Luffborough v. Parker*, 16 Serg. & R. 351; *Washington v. Pratt*, 8 Wheat. 681; *Farnum v. Buffum*, 4 Cush. 260; *Lessee of Wilkin’s Heirs v. Huse*, 10 Ohio, 139; *Kinney v. Beverly*, 2 Hen. & M. 318; *Allen v. Smith*, 1 Leigh, 254; *Wistar v. Kammerer*, 2 Yeates, 100; *Delogny v. Smith*, 3 La. 418; *Games v. Stiles*, 14 Peters, 322; *Prindle v. Campbell*, 9 Minn. 212; *Ronkendorff v. Taylor*, 4 Peters, 349.

⁶ *Styles v. Weir*, 26 Miss. 187. Mr. Justice Fisher, in delivering the opinion of the court, said: “It has so often been decided that in sales of

§ 1353. **Special instances.**—A tax deed reciting that the officer, prior to the sale of the land, gave four weeks' notice thereof in the manner required by law, is insufficient to pass the title, if it contains no further recital of the time and manner of the notice.¹ Mr. Justice Wagner said of the statement of the officer that he had given notice in the manner prescribed by law: "That is simply a conclusion or opinion by the officer in reference to a fact, which it is the province of a court to judge. A ministerial officer, in making a return or recital as to how he executed a power, must set out the facts and the manner in which he performed the act, and let the court determine whether they comply with or are in accordance with the law. What the collector considered to have been notice as required by law we cannot determine. But it is well settled that it is a judicial act to pass upon the question whether a service or notice has been had in conformity to law, and that the collector was not invested with any such authority. The officer should state the facts as to how he performed his duties, and leave the conclusion of law thereon to the determination of the courts. The recital of notice in the deed simply amounts to nothing, and without giving the required notice the collector had no right or authority to sell."² "A regular notice published as the

this kind every essential feature of the law must be observed to uphold the sale, that we deem it unnecessary even to cite the authorities. Under the law, as it then existed, this sale was clearly void. The object of the law in requiring such advertisements was twofold: to notify the absent party that he stood charged with a certain tax, which, if not paid by a certain day, his land would be sold; and to notify the public of the time and place of the sale. Only the last object could be accomplished by this advertisement. It conveyed no notice whatever to Whitehead that he was either a taxpayer on account of the land, or that he was in default in its payment."

¹ *Spurlock v. Allen*, 49 Mo. 178.

² In *Spurlock v. Allen*, 49 Mo. 178, 180. See, also, *Nelson v. Pierce*, 6 N. H. 194; *Wells v. Burbank*, 17 N. H. 393; *Farnum v. Buffum*, 4 Cush. 260; *People v. Highway Commrs.*, 14 Mich. 528; *Gilbert v. Turnpike Co.*, 3 Johns. Cas. 107; *Briggs v. Whipple*, 7 Vt. 18; *Cheatham v. Howell*, 6 Yerg. 311; *Lovejoy v. Lunt*, 48 Me. 377; *Gwin v. Vanzant*, 7 Yerg. 143; *Games v. Stiles*, 14 Peters, 322.

law requires is the very foundation of the collector's authority to sell. In selling lands for taxes he is executing a mere naked statutory power, and the rights of the citizen to his property cannot be divested by this kind of sale, unless it appears affirmatively from the form of the collector's deed that all the prerequisites of the statute have been strictly pursued. This is the settled law of this State."¹

§ 1354. Continued.—Of course, with greater reason, where the statute requires a certain notice to be given prior to the sale, a tax deed which contains no recital that any notice whatever was given is void. No title passes by it.² The distinction between a sale by an officer for taxes and a sale by a sheriff under judicial process issued by a competent court, is thus stated by Judge Adams: "The sheriff's proceedings are subject to the supervision of the court, and the court whose process he abuses is the proper tribunal to apply the remedy. The purchaser under a judicial sale looks to the judgment, execution, levy, and sheriff's deed; if they are right, all other questions are between the parties to the judgment and the sheriff. It is eminently proper that the court issuing the process should apply the remedy. Hence, such questions arising under a judicial sale cannot be inquired into collaterally, but can be reached only by a direct proceeding instituted in the proper court for that purpose. A collector's sale is essentially *ex parte*. The officer does not act under the supervision of a court; he acts at his own peril and by his own advice, and must perform every prerequisite required by the statute before the title of the citizen to his property can be passed away from him. The deed of the collector must show affirmatively that the law has been complied with in all particulars. And even when a collector's deed shows by its recitals that the law has been complied with, it may be contradicted as to

¹ Large v. Fisher, 49 Mo. 307, and cases cited.

² Abbott v. Doling, 49 Mo. 302.

material matters by evidence, wherever the questions arise, whether in a collateral proceeding or otherwise. This is the settled law in this State.”¹

§ 1355. Statement of amount of tax due.—“It is of great importance to the rights of property that positive

¹ In *Abbott v. Doling*, 49 Mo. 302, 304. In *Parker v. Rule's Lessee*, 9 Cranch, 64, 69, Mr. Chief Justice Marshall, in delivering the opinion of the court, said of a statute of Tennessee: “There is, throughout the act, an obvious anxiety in the legislature to avoid coercive means of collection, unless such means should be necessary, and to give every owner of lands the most full information of the sum for which he was liable, and to afford him the most easy opportunity to pay it. Thus, the accruing of the tax is to be advertised, and the times and places at which the collector will attend to receive it. A personal demand at the dwelling-houses of those who have neglected to attend to this notice must then be made, a reasonable time before the collector can collect the tax by distress. Where lands are owned by nonresidents whose places of residence are known, this personal notice is still required; and where their residence is unknown, certain publications are substituted for and deemed equivalent to personal notice and demand. In each case, it is made the duty of the collector to proceed to collect the tax by distress and sale.

“From this view of the law it is inferred, not only that the legislature was anxious to avoid coercive means of collection, but has also manifested a solicitude to collect the tax by distress and sale of personal property rather than by a sale of the land itself. That all the means of collection prescribed in the act must have been tried, and must have failed before a sale of the land can be made. The duty of the collector to make a personal demand from the resident owner of lands, and to make those publications which the law substitutes for a personal demand where the residence of the owner is unknown, does not depend on the fact that personal property is or is not on the land from which the tax may be levied by distress. It is his duty to proceed in the manner prescribed in the ninth and eleventh sections, in every case. And after having so proceeded, it is his positive duty to levy the tax by distress, if property liable to distress can be found. If, notwithstanding the proceedings directed in the ninth and eleventh sections, the tax shall remain one year unpaid, it is to be raised by a sale of the land. It appears to the court that the thirteenth section presupposes everything enjoined in the ninth and eleventh sections to have been performed, and that the validity of the sale of land owned by a nonresident made by the collector for the nonpayment of taxes must depend not only on his having made the publications required in the thirteenth section, but on his having made those also which are required in the eleventh section. Those publications not having been made in this case, it is the opinion of the majority of this court that the sale is void, and that the judge of the District Court committed no error in giving this instruction to the jury.”

regulations of statute which authorize its seizure and sale, without the consent of the owner, should be strictly complied with. These regulations are the legal formalities, as essential to the validity of the sale and the transfer of title as are the common and ordinary forms of making and executing deeds between individuals.”¹ Where the advertisement and notice of sale contain a statement that the tax is four dollars and twelve cents, when the tax is in fact only three dollars and thirty cents, the sale is void. For all legal purposes, this notice was as invalid as if it had contained no statement of any kind of the amount of the tax. Unless the exact amount is given, the statute is not complied with.² “A deviation, however small, is fatal, because a rule of law cannot be made to fluctuate according to the degree or extent of its violation.”³ In a case where it was necessary to decide whether the advertisement should contain a particular statement of the amount of taxes due on each lot separately, or where several lots belonged to the same person, the advertisement might not state the aggregate amount of taxes due on all the lots belonging to the same person, Mr. Justice Johnson said: “This may be a very immaterial question, practically, and it may not be very easy to assign a sufficient reason of policy for the one or other alternative. But what have we to do with such inquiries in cases of positive enactment? The law must be pursued, whatever be the previous steps required.” The court came to the conclusion that the taxes of each lot ought to be separately exhibited.

¹ *Alexander v. Pitts*, 7 Cush. 503, 505, per Mr. Justice Bigelow.

² *Alexander v. Pitts*, 7 Cush. 503; *Smith v. Ryan*, 88 Ky. 636; *Kimball v. Ballard*, 19 Wis. 601; 88 Am. Dec. 705; *Burroughs v. Goff*, 64 Mich. 464; *Pack v. Crawford*, 29 Ark. 489; *Glidden v. Chase*, 35 Me. 90; 56 Am. Dec. 690; *Huse v. Merriam*, 2 Me. 376; *Knox v. Higby*, 76 Cal. 264; *Treadwell v. Patterson*, 51 Cal. 637; *Case v. Dean*, 16 Mich. 12; *Pierce v. Schutt*, 20 Wis. 423; *Hammontree v. Lott*, 40 Mich. 190; *Barden v. Columbia County*, 33 Wis. 445; 14 Am. Rep. 762; *Baker v. Columbia County*, 39 Wis. 447; *Doland v. Mooney*, 79 Cal. 137; *Treadwell v. Patterson*, 51 Cal. 637; *Board of Regents v. Linscott*, 30 Kan. 240.

³ *Alexander v. Pitts*, 7 Cush. 503.

The advertisement was required to state the "amount of taxes." The court said, that in its ordinary signification, the term would mean an aggregate of taxes, but that the aggregate idea could not be applied to a sum made up from the taxes of many lots, as the adoption of this view would also support a publication showing nothing more than the amount of taxes due upon the whole list of lots advertised, whoever the proprietors might be. "Some more appropriate signification must, therefore, be sought for it; and this is easily found; for when it is considered that the taxes of each lot are made several liens upon each, it follows that this aggregate idea can have reference only to the amount made up from the arrears of the two years, which must be due to authorize a sale." "The operation of such a provision must be the test of its own policy. The duty is easily complied with, and the performance of it may not be destitute of practical utility."¹ A tax sale is void if made in excess of one dollar of the amount allowed by law.²

§ 1356. Transposition of amounts due.—Where the statute does not require the advertisement to state the sums of the State and county taxes severally, a transposition in the advertisement of the sums due for State and county purposes is not such an error as will invalidate the sale.³

¹ *Corporation of Washington v. Pratt*, 8 Wheat. 681, 687. A sale is invalid if a portion of the taxes for nonpayment of which the land is sold is illegal: *McLaughlin v. Thompson*, 55 Ill. 249; *Drake v. Ogden*, 128 Ill. 603; *Libby v. Burnham*, 15 Mass. 144; *Bangs v. Snow*, 1 Mass. 181; *Hardenburgh v. Kidd*, 10 Cal. 402; *Wills v. Austin*, 53 Cal. 152; *Hodgon v. Burleigh*, 4 Fed. Rep. 111; *Drew v. Davis*, 10 Vt. 506; 33 Am. Dec. 213; *Barker v. Blake*, 36 Me. 433; *Elwell v. Shaw*, 1 Me. 339; *Noble v. Indianapolis*, 16 Ind. 506; *McQuilkin v. Doe*, 8 Blackf. (Ind.) 581; *McCann v. Merriam*, 11 Neb. 241; *Kemper v. McClelland*, 19 Ohio, 308; *Peterson v. Kittredge*, 65 Mass. 33; *Brown v. Snell*, 6 Fla. 741; *Gamble v. Witty*, 55 Miss. 26; *Shattuck v. Daniel*, 52 Miss. 834; *Young v. Joslin*, 13 R. I. 675; *Covell v. Young*, 11 Neb. 510; *Rougelot v. Quick*, 34 La. Ann. 123.

² *Axtell v. Gerlach*, 67 Cal. 483. See *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485; *Bucknall v. Story*, 36 Cal. 67; *Harper v. Rowe*, 53 Cal. 233; *Treadwell v. Patterson*, 51 Cal. 637; *Doland v. Mooney*, 79 Cal. 137; *Knox v. Higby*, 76 Cal. 264.

³ *Scott v. Watkins*, 22 Ark. 556. See as to advertisement of sale of a

§ 1357. **Designation of time and place of sale.**—The sale must be made at the time and place required by statute. Where a statute requires the sale to be made at the treasurer's office, and the notice states that the sale will be made at the front door of the courthouse, instead of at the treasurer's office, and the treasurer's office, at the time of the sale, was undergoing some repairs, the treasurer having removed temporarily to another building, a sale made at such temporary office is void.¹ A notice of sale was in this form: "Delinquent Tax List. Treasurer's Office, Linn Co., Kansas, March 5, 1873. Notice is hereby given that the following list of lands and town lots are subject to sale for the taxes of the year 1872, remaining unpaid, and that so much of each tract of land or town lot as may be necessary for the purpose will, on the first Tuesday of May, 1873, and the next succeeding days, be sold by me at public auction for the taxes and charges thereon." The notice, as will be observed, gives the time of sale, but is silent as to the place where the sale is to be made. The court held that, as the notice failed to state the place of sale, a sale had under the notice was void.² "We regard the notice of sale," said Mr. Justice Brewer, "as a vital matter in tax-sale proceedings. In that notice time, place, and description are matters of substance, while defects in any of these matters, if not such as to mislead, may be mere irregularities, yet entire omission of either is fatal. A sale for taxes is the exercise of a statutory power, and one conditioned upon certain essential prerequisites. One is, that a proper and sufficient notice of the sale be given. Without such a notice, the power to sell does not exist. The statute names the essential facts in such a notice. An entire omission of any one is something more than a mere irregularity."³ An officer au-

proprietary tax, *Wentworth v. Allen*, 1 Tyler, 226. See, also, where an advertisement under the statute was held sufficient, *Ronkendorff v. Taylor*, 4 Peters, 349.

¹ *Richards v. Cole*, 31 Kan. 205.

² *Corbin v. Young*, 24 Kan. 198.

³ In *Corbin v. Young*, 24 Kan. 198. A sale cannot be sustained which

thorized to sell land for delinquent taxes announced that the sale would be adjourned from day to day, and posted a notice containing this announcement. He did not, however, resume the sale, and adjourn it upon the following or any subsequent day, making no further offer to sell the lands, until an agent of the purchaser delivered to him a list of tracts belonging to delinquent owners, proposing to take the land for the taxes due on behalf of each person whose name was placed opposite to each tract on such list. No better offer being made, the officer struck off the entire list. The court declared that this sale did not constitute a public sale as intended by the statute, and, accordingly, the sale was set aside as irregular.¹

§ 1358. **Subject continued.**—In an action to quiet title, founded on a tax deed, an averment in the answer that the tax sale was held “on the seventeenth day of March, a day not authorized by law therefor,” presents a defense, to which a demurrer cannot be sustained. It was insisted that the day specified in the answer might have been a legal day for the sale, because there might have been an adjournment to that day. But the averment that the day specified was not a day authorized by law, precluded, in the opinion of the court, the supposition that the day might have been an authorized day by reason of an adjournment.² By statute the day for sale was fixed on the first Monday of July, and by a subsequent statute the day of sale was postponed thirty days. In the year in which a sale was made, the first Monday in July fell

is held at a time other than that prescribed by statute: *Haynes v. Heller*, 12 Kan. 381; *Park v. Tinkham*, 9 Kan. 615; *Harkreader v. Clayton*, 56 Miss. 384; 31 Am. Rep. 369; *Vernon v. Nelson*, 33 Ark. 748; *Conrad v. Darden*, 4 Yerg. (Tenn.) 307; *Rodd v. Purdy*, 10 S. C. 137; *Den v. Rose*, 4 Dev. (N. C.) 549; *Eutrekin v. Chambers*, 11 Kan. 368; *Gomer v. Chaffee*, 6 Colo. 314; *Allen v. Ozark Land Co.*, 55 Ark. 549; *Caston v. Caston*, 60 Miss. 475; *McGehee v. Martin*, 53 Miss. 519; *Mayer v. Peebles*, 58 Miss. 628; *Mead v. Day*, 54 Miss. 58; *Chandler v. Keeler*, 46 Iowa, 596; *Dougherty v. Crawford*, 14 S. C. 628; *Essington v. Neill*, 21 Ill. 139.

¹ *Butler v. Delano*, 42 Iowa, 350.

² *Plympton v. Sapp*, 55 Iowa, 195.

on the third day of that month. The sale for taxes was made on the seventh day of August, more than thirty days after the first Monday in July. The sale being made on the wrong day, the court held that a deed showing a sale on such day was void on its face.¹ So, where the officer has no power to sell until after the 20th of April, a sale made on the 17th of April is premature and void. If the deed shows a sale on this prior day, the deed is a nullity.²

§ 1359. **Subsequent day.**—Where a sale is not begun on the day named in the notice of sale, the officer has no power to sell at a subsequent time.³ So where the statute requires that a sale shall be made on the second Monday succeeding the commencement of the term of the court at which judgment against the land is rendered, the sale, if not made on that day, is void.⁴ An advertise-

¹ *McGehee v. Martin*, 53 Miss. 519; *Harkreader v. Clayton*, 56 Miss. 383; 31 Am. Rep. 369.

² *Gomer v. Chaffee*, 6 Colo. 314. Mr. Chief Justice Elbert, in delivering the opinion of the court, said: "The power of an officer making a tax sale is purely statutory. A statutory power must be exercised according to statutory directions. In no class of cases has this rule been more strongly insisted upon than in case of tax sales. A substantial, and in many cases a strict, compliance with the provisions of the law preparatory to and authorizing the sale, is a condition of the power and essential to its rightful exercise. Doubtless, certain provisions of the revenue law are merely directory, but when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, such as, if disregarded, would injuriously affect his rights, they are to be treated as mandatory. They must be followed, or the acts done will be invalid. To the class of mandatory provisions belong requirements respecting notice and time and place of sale. Every notice which the statute provides for the benefit and protection of the taxpayer must be given with scrupulous observance of all its requisites. It cannot be shortened a single day, and if required to be given within a certain time, or in any prescribed mode, it must be so given. The sale must be made at the very time and place provided by law for that purpose. The officer has no power to sell at any other time or place."

³ *Prindle v. Campbell*, 9 Minn. 212. See, also, *Sheehy v. Hinds*, 27 Minn. 259; *Entrekin v. Chambers*, 11 Kan. 368; *Park v. Tinkham*, 9 Kan. 615.

⁴ *Hope v. Sawyer*, 14 Ill. 254. See, also, as to notice of time and place of tax sales, *Dougherty v. Crawford*, 14 S. C. 628; *McDermott v.*

ment stated that notice was given that certain pieces of land would "be exposed to sale on Thursday, the twenty-second day of May next, at the courthouse in Warren, to defray the tax" of a certain year. It was signed by the officer, with the addition to his name of his office, "collector." It was contended that the advertisement was invalid because the collector did not add "Trumbull County" to his signature as collector, and to Warren, also, as the place of sale. The court held that the advertisement was sufficient without the addition contended for.³

§ 1360. Omission to state year.—An advertisement stated the time of sale to be "the fourth day of April next," without giving the year. The advertisement, however, was posted up January 31, 1874, and remained posted until the day of sale, and it was published three

Scully, 27 Ark. 226; *Spain v. Johnson*, 31 Ark. 314; *Bonnell v. Roane*, 20 Ark. 114; *Hogins v. Brashears*, 13 Ark. 242; *Merrick v. Hutt*, 15 Ark. 331; *Vernon v. Nelson*, 33 Ark. 748; *Kelso v. Boston*, 120 Mass. 297; *Wilkins v. Huse*, 10 Ohio, 139.

³ *Sheldon v. Coates*, 10 Ohio, 278. "At the date of this advertisement," said Mr. Justice Wood, in delivering the opinion of the court, "there was no township of the name of either Youngstown or Warren, except those in Trumbull County, in the State of Ohio. An advertisement in an Ohio newspaper, dated Youngstown, in 1806, would sufficiently indicate Youngstown, in Trumbull County, and if written and posted up at the door of the courthouse, or anywhere within the bounds of Trumbull County, as the law required, it would certainly, to a common intent, at least, indicate the same thing. But when in addition, the names of the owners, the lot, township, range, etc., are all specified, the owner in casting his eye upon such an advertisement could not well mistake the identity of his property, if advertised, nor a person desirous of purchasing, its location, unless both were determined not to know its contents and to sleep upon their rights. In this advertisement, these designations are all set forth, though at most it is doubtful whether the law, at that time, required anything more to be stated in the advertisement, than that such lands as were delinquent for taxes, in the collection district, would be sold at such a time and place. But if the advertisement was not then sufficiently certain, they should be gross defects only which should be noticed, if at all, after the lapse of *thirty-four* years, and a majority of the court are of the opinion that the advertisement was sufficient." The court lay stress on the fact that the long lapse of time should prevent minor defects being noticed, but the majority of the court held the advertisement sufficiently definite.

weeks successively in the newspapers in the month of February, 1874. The court decided that the notice was sufficiently definite, although the year was not stated, as no one could be misled by the notice as to the time of the sale.¹

§ 1361. **Posting in public places.**—If the statute requires that the advertisement shall be posted in a “public place,” it is unnecessary to post the advertisement in an unincorporated place which is uninhabited.² In Michigan, the statute provided that “the auditor general shall annex to, and cause to be published with each of said statements, a notice that so much of each tract or parcel of land described in said statements as will be necessary for the purpose, will be sold by the county treasurer on the first Monday in October next thereafter, at such public and convenient place at the seat of justice of the county as the county treasurer may select, for the payment of the taxes, interest, and charges thereon.” The court decided that a notice which stated that the sale would be made at such public and convenient place as the county treasurer should select at the county seat, was a sufficient compliance with the statute.³ Mr. Justice Christiancy

¹ Taft v. Barrett, 58 N. H. 447. It has been held that although a notice states correctly the amount of the tax, yet, if it states erroneously the year for which the tax was assessed, the defect is fatal: Knowlton v. Moore, 136 Mass. 32.

² Wells v. Burbank, 17 N. H. 393. Said the court (p. 411): “It is not necessary to settle at this time what may be a public place within the meaning of the statute. Practically, it is generally supposed to mean a tavern, store, or other place where people are in the habit of resorting for the transaction of business. Perhaps a meeting-house, open from week to week for public worship, may come within the description. How we might hold in this case if there had been a dwelling-house within the township, but no place more public, we have no occasion to inquire. As there was no inhabitant, there could be no public place. *Lex non cogit ad impossibilia*. The result is not that the tax could not be collected because no advertisement could be posted in a public place in the township, but that it might be collected without such advertisement, if the other notices required by the statute were duly given.” And see, also, Wells v. Company, 47 N. H. 255; Cahoon v. Coe, 52 N. H. 525.

³ Clark v. Mowyer, 5 Mich. 462. This case was affirmed in Wisner v. Davenport, 5 Mich. 501.

said that the question was purely one of statutory construction. "The power of the legislature to authorize a sale of these lands for the taxes, without any such notice of the place, is admitted. We are not, then, to inquire what we think the legislature *should* have required in reference to the notice of sale, but what they have *actually seen fit to require*. The court are not to make or amend the statute, but to construe it as it is; and the whole office of construction is to ascertain and give effect to the intention of the legislature. And in construing statutes in reference to tax sales, the rules of construction should be no more strict or technical, nor more loose and fanciful, than in the construction of statutes generally. In all alike, the legislative intent must govern."¹

¹ In *Clark v. Mowyer*, 5 Mich. 462, 465. The proposition urged in this case was, that the county treasurer should select the particular place of sale at the county seat, and notify the auditor general of the selection before notice of sale was given, and that the place so selected should be inserted in the notice issued by the auditor general. The court said: "The *first* and obvious answer to this proposition is, that if the legislature had intended the notice to state the particular house or place selected by the treasurer, it would have been easy, and in the natural course of legislation upon a matter where certainty in the law was so important, and where any uncertainty might materially affect the revenue of the State, to have said so expressly. It was a matter which could not well have escaped their notice. They had expressly given the treasurer the right to select, and if we believe it did escape their notice, then it clearly cuts off all inference of the intent claimed, and it would then be a *casus omissus*, and not within the statute. But, *second*, if it were intended that the several county treasurers should so inform the auditor general of the place selected before he issued his notice, it would have imposed it as a duty upon the county treasurers to make such selection before that time, and officially to notify the auditor general of the fact, and have given him, also, a right to demand its performance. But the law, so far from imposing this upon the treasurers as an official duty, has not even authorized them to do so officially; and hence any notification by such treasurer of such selection would be an unofficial act, and of no binding authority. Suppose the treasurer was called upon to select and notify the auditor, and should refuse, could this court compel him to do so by *mandamus* under this law? Clearly, it could not. It is little less than absurd to suppose that the legislature intended to leave the revenue of the State thus dependent upon the mere chance of the auditor being able to divine beforehand the various places selected, or to be selected by the several county treasurers in the State, without requiring

§ 1362. **Particular place of sale.**—If the statute requires the sale to be made before the courthouse door of the county, the sale, if made inside the courthouse, is

them to give the information. It is not very reasonable to suppose the legislature intended to make the public revenue dependent upon the unofficial politeness of thirty or forty different county treasurers, acting upon their separate and individual responsibility, without any of the obligations of official duty. But, *third*, this proposition is not sustained by the language of the statute. If it had been the intention that the treasurer should first select and notify the auditor of the place selected, and that he should state the place so selected, it would more properly have used the terms 'at such place as the county treasurer *may have selected*,' and not 'at such place as the treasurer *may select*.' The entire clause looks to the future, and not to the past. But, *fourth*, suppose the statute were ambiguous or doubtful as to this point; suppose, even, it were barely susceptible of a construction not requiring the auditor to state the place; and (what I think is contrary to the fact) that the more obvious construction were such as the plaintiff claims, still from the very date of the act it has received a different practical construction in the auditor general's office, which, in this respect, has been uniform from that day to this. Every sale for taxes made in the State for the last twelve years has been made under this practical construction, and under an auditor's notice, precisely the same as that given in this case, not one in which the place selected by the treasurer has been stated. This practical construction must have been known to the legislature. We cannot suppose them ignorant of what all other men knew in reference to the public acts of one of the executive departments of the government, upon which, more than any other, depended the revenue of the State. Yet, with full knowledge of this practical construction, the legislature, in 1853, when they entirely remodeled the tax laws of the State, continued this provision without the alteration of a letter. A like general revision of the tax laws is again made in 1858, and this provision is retained without alteration. Rights have become vested under this construction to the amount of many hundred thousands, and perhaps even millions of dollars; and it is now too late to disturb this construction (unless it be clearly against any possible construction of the statute) without wantonly disregarding the principles of justice and sound policy, for centuries well settled by judicial decisions. That such legislative sanction should have weight in the construction of the statute, see *Coutant v. People*, 11 Wend. 511; *Rex v. Loxdale*, 1 Burr. 447; *Henry v. Tilson*, 17 Vt. 479; *McKenzie v. State*, 6 Eng. 594; *United States v. Freeman*, 3 How. 557. That the practical construction so long given by the auditors general in their notices of sale under this section should control in this case, see 2 Coke R. 81; *Co. Lit.* 186 n.; *Earl of Buckinghamshire v. Drury*, 2 Eden, 61, 64, 74; *United States Bank v. Halstead*, 10 Wheat. 51, 63; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 530, 579; 49 Am. Dec. 189. Practical construction by departments at Washington: *Surgett v. Lapice*, 8 How. 68; *Bissell v. Penrose*, 8 How. 336. Practical construc-

void, and the sale and subsequent deed pass no title.¹ "It is well established in this State, that a person claiming to hold land under a sale for taxes can only maintain his title when the law has been strictly pursued. It is immaterial whether it was more convenient to all persons, or better in any respect, to sell within than before the courthouse; the law has prescribed the place of sale, and that is the only proper place; and it is so because the law has said so, and there can be no reasoning about it."² Under a statute requiring an advertisement to be posted up in some public place, it is held that a shoemaker's shop is not a public place.³ Where an affidavit stated that one notice was posted "on the inner walls of the Peshtigo Co's store at Peshtigo village," one "on the inner walls of the postoffice in Marinette," and one "on the inner walls of the postoffice in the city of Oconto," but omitted to state that the places specified were public places, the court decided that in the absence of proof to the contrary, it will be presumed that places of the kind named in the affidavit are public places.⁴

§ 1363. Publication of notice in newspaper.—If a statute requires a notice to be published for five days, "Sundays and nonjudicial days excepted," and if the last day of publication falls on a Sunday, and the notice is published in the paper issued on that day, the statute has not been complied with. The last day being Sun-

tion of constitution: *Stuart v. Laird*, 1 Cranch, 299; *McCulloch v. Maryland*, 4 Wheat. 316; *Briscoe v. Bank of Kentucky*, 11 Peters, 319; *United States v. Hudson*, 7 Cranch, 32. As to form of acknowledgment of deeds: *McFerran v. Powers*, 1 Serg. & R. 102; 5 Cranch, 22. See, also, *Jackson v. Jumaer*, 2 Cowen, 552."

¹ *Rubey v. Huntsman*, 32 Mo. 501; 82 Am. Dec. 143.

² *Rubey v. Huntsman*, 32 Mo. 501; 82 Am. Dec. 143. See, also, *Vasser v. George*, 47 Miss. 713; *McNair v. Jenson*, 33 Mo. 312; *State v. Rollins*, 29 Mo. 267.

³ *Tidd v. Smith*, 3 N. H. 178.

⁴ *Hart v. Smith*, 44 Wis. 213. A sale must be made at the place designated by statute, or it will not be upheld: *Park v. Tinkham*, 9 Kan. 615; *Richards v. Cole*, 31 Kan. 205.

day it is not to be counted.¹ If the statute requires the publication to be in the newspaper of the public printer of the State, and before the expiration of the time for publication such paper had ceased to be the State paper, the notice is not sufficient.² One of the provisions in the Constitution of the State of Illinois was: "Hereafter no purchaser of any land or town lot, at any sale of land or town lots for taxes due either to this State, or any county, or incorporated town or city within the same, or at any sale for taxes or levies authorized by the laws of this State, shall be entitled to a deed for the land or town lots so purchased, until he or she shall have complied with the following conditions, to wit: Such purchaser shall serve, or cause to be served, a written notice of such purchase on every person in possession of such land or town lot, three months before the expiration of the time of redemption on such sale, in which notice he shall state when he purchased the land or town lot, the description of the land or town lot he has purchased, and when the time of redemption will expire. In like manner he shall serve on the person or persons in whose name or names such land or lot is taxed, a similar written notice, if such person or persons shall reside in the county where such land or lot shall be situated; and in the event that the person or persons in whose name or names the land or lot is taxed do not reside in the county, such purchaser shall publish such notice in some newspaper printed in such county; and if no newspaper is printed in the county, then in the nearest newspaper that is published in this State to the county in which such land or lot is situated; which notice shall be inserted three times, the last time not less than three months before the time of redemption shall expire. Every such purchaser, by himself or agent, shall, before he shall be entitled to a deed, make an affidavit of his having complied with the conditions of this section, stating particularly the facts relied on as such com-

¹ *San Francisco v. McCain*, 50 Cal. 210; *People v. McCain*, 51 Cal. 360.

² *Bussey v. Leavitt*, 12 Me. 378.

pliance; which affidavit shall be delivered to the person authorized by law to execute such tax deed, and which shall by him be filed with the officer having custody of the records of lands and lots sold for taxes, and entries of redemption in the county where such land or lot shall lie, to be by such officer entered on the records of his office, and carefully preserved among the files of his office; and which record or affidavit shall be *prima facie* evidence that such notice has been given." These constitutional provisions came before the supreme court of that State for construction, and Mr. Chief Justice Treat, in delivering the opinion of the court, said that they were manifestly designed for the benefit of the real estate owner. "The principle is, that he shall not be divested of his title by a sale for taxes, unless he has, when practicable, personal notice of the sale, and of the time when his right to redeem will expire. To secure this object, the purchaser is required to serve a written notice of those facts on every person in possession of the land, and on the party in whose name it was listed for taxation, at least three months before the time of redemption will expire. If the latter is not a resident of the county, a similar notice must be published in a newspaper of the county; and if there is no newspaper within the county, the notice must be published in the nearest newspaper to the county. These requirements, being intended for the protection of the owner, must be strictly complied with in order to divest him of title. They are imperative, and cannot be disregarded. The purchaser is not entitled to a deed until these precedent conditions are strictly performed; and if he succeeds in obtaining a deed without such performance, the title of the owner will not thereby be defeated. In this case, the plaintiff, in whose name the land was assessed, did not reside in the county, and no newspaper was published therein. It was, therefore, incumbent on the defendant to give notice in the 'nearest newspaper published in this State to the county.' The question is, has he complied with this requisition? It is

clear that the answer must be in the negative. The notice is to be published in the nearest newspaper to the county. That is a matter of fact which is easily ascertained. A newspaper of an adjoining county may not be the nearest newspaper to the county in which the land is situated. And the newspapers of the adjoining counties may not be equally near to the county where the land lies. The question which is the nearest newspaper to the county must necessarily be determined by comparing the distances between the places of publication and the county line. That is the only way of ascertaining the paper in which to give the notice. In this case, there were four newspapers published nearer to the county than the one in which the notice was inserted. The notice should have appeared in the Alton paper, its office of publication being several miles nearer to the county than that of the Carrollton papers. The fact that the latter paper had a respectable circulation in the county has nothing to do with the question. The owner has the right to insist upon a strict execution of this requirement of the constitution. He is not to be deprived of his estate, except in the mode prescribed. The affidavit of the defendant was only *prima facie* evidence that the notice was published in the nearest newspaper. It was competent for the plaintiff to prove that the fact was otherwise, and when that was done, the sheriff's deed necessarily fell for the want of a foundation upon which to stand."¹

§ 1364. **Variance in name of paper.**—A statute required an advertisement to be published in the Vermont Republican, printed at a certain place. The record showed that the advertisement was published in the Vermont Republican and American Yeoman, printed at the same place. The court held that the latter sufficiently appeared to be the same paper designated in the statute.²

¹ Weer v. Hahn, 15 Ill. 298, 301.

² Isaacs v. Shattuck, 12 Vt. 668. Redfield, J., in delivering the opinion of the court, said: "Had the name of the paper been entirely changed, it might be necessary that it should in some way appear to be

§ 1365. **Paper partly printed in county.**—Where the publisher of a newspaper has the half of each issue printed out of the county, and the other half, including the notice of sales for delinquent taxes, together with other matters of local interest, is printed in the county, the paper is considered to be printed in the county, as contemplated by the statute.¹

§ 1366. **Publication in several newspapers.**—A statute in Ohio provided that the officer on receiving the delinquent list should immediately cause the same to be advertised for six weeks successively in some newspaper printed at the seat of government of the State, and also in a newspaper printed in his proper county, if any such there was, and if not, in some newspaper in most general circulation in such county. It was contended before the supreme court, that as there was no paper printed in the county in which the land sold for taxes was situated, and as the paper published at the capital of the State was in general circulation in that county, it was not necessary to publish it in any other. But the court said that such a construction could not be placed upon the law. The statute required the publication, according to the views of the court, to be made in two papers.² The court in concluding its opinion made this observation: "The requisitions of the law are substantial and useful, and cannot be dispensed with. Tax sales are attended with greater sacrifices to the owners of land than any others. Purchasers at those sales seem to have but little con-

the same paper in which the statute required the publication. But the assumption of some kind of surname, or *nom de guerre*, not as Scipio received the surname of Africanus, in consequence of what he *had* done, but as a mere catch or indication of the principles which they *intend* to adopt and advocate, is of so common occurrence among newspaper publishers as to attract no more attention from the public than does the change of the 'text' or motto, or of the type in which the name of the paper is printed. The second name of a newspaper is seldom, if ever, regarded in common parlance, and need not have been in the record. But the 'addition' raises no doubt of the identity of the paper."

¹ Hart v. Smith, 44 Wis. 213.

² Lessee of Hughey v. Horrel, 2 Ohio, 231.

science They calculate on obtaining acres for cents, and it stands them in hand to see that the proceedings have been strictly regular.”¹ If the law requires that the officer shall, at least a specified time before the expiration of the period allowed for redemption, cause to be published for a certain time in all the public newspapers printed in the State a notice that unless the lands should be redeemed by a certain day they would be conveyed to the purchaser a failure to publish a notice in compliance with the statute, in one or more of such newspapers, renders void the conveyance made by the officer to the purchaser.²

§ 1367. **Time of publication.**—Where a statute requires a notice of intention to make street improvements to be published daily, with the exception of Sundays, for ten days in the newspaper having the contract for the public printing, the notice, if printed in such paper for eight out of ten consecutive days, the two remaining days being Sundays, the paper not being issued on such days, is not published for the requisite time. In such a case the publication is insufficient and void.³ Where the statute requires the notice to be published for twenty days, a publication for nineteen days is insufficient. “If the treasurer could reduce the time to nineteen days, there is no reason why he might not have made it ten, or any less number.”⁴ If a statute requires a notice to be published daily, Sundays excepted, in a newspaper for five days, a publication commencing on the fourth day of the month and ending on Sunday, the eighth day of the month, is insufficient, as the last publication should have appeared on the ninth.⁵ Under a statute requiring that a notice of the time and place of the sale of real property for taxes shall “be given by advertisement inserted

¹ In *Lessee of Hughey v. Horrel*, 2 Ohio, 231, 233.

² *Bunner v. Eastman*, 50 Barb. 639.

³ *Haskell v. Bartlett*, 34 Cal. 281.

⁴ *State v. Mayor of Newark*, 36 N. J. L. 288.

⁵ *Alameda Macadamizing Co. v. Huff*, 57 Cal. 331.

in some newspaper published in said city, once in each week for at least twelve successive weeks," the notice must be published for twelve full weeks, or eighty-four days. If the notice is published for only eighty-two days, the sale is illegal and no title passes.¹ In this case the question was whether the statute meant that twelve insertions in successive weeks was sufficient notice, without respect to the number of days in twelve weeks. The language of the court on this point was: "We do not doubt that if the statute had been 'once in each week for twelve successive weeks,' a previous notice of the particular day of sale having been given to the owner of the property, that it might very well be concluded that twelve notices in different successive weeks, though the last insertion of the notice for sale was on the day of sale, was sufficient. But when the legislator has used the words, 'for at least twelve successive weeks,' we cannot doubt that the words, at least as they would do in common parlance, mean a duration of the time that there is in twelve successive weeks or eighty-four days. Every statute must be construed from the words in it, and that construction is to be preferred which gives to all of them an operative meaning. Our construction of the statute under review gives to every word its meaning. The other leaves out of consideration the words 'for at least,' which mean a space of time comprehended within twelve successive weeks or eighty-four days. The preposition 'for' means, of itself, duration when it is put in connection with time, and as all of us use it in that way, in our every-day conversation, it cannot be presumed that the legislator, in making this statute, did not mean to use it in the same way. Twelve successive weeks is as definite a designation of time, according to our division of it, as can be made. When we say that anything may be done in twelve weeks, or that it shall not be done for twelve weeks, after the happening of a fact which is to precede it, we mean that it may be done in twelve weeks or eighty-four days, or, as the case may be, that it

¹ Early v. Doe, 16 How. 610.

shall not be done before. The notice for sale in this instance was the fact which was to precede the time for sale, and that is neither qualified nor in any way lessened by the words 'once a week' which precede in this statute those which follow them, 'for at least twelve successive weeks.' The construction of the statute will be recognized to be in harmony with that policy of the law which experience has established to protect the ownerships of property from divestiture by statutory sales, where there has not been a substantial compliance with the law, by which a public officer is empowered to sell it. Property is liable to be sold on account of an undischarged obligation of the owner of it to the public or to his creditors. But it can only be done in either case where there has been a substantial compliance with the prerequisites of the sale, as those are fixed by law. Any assumption by the officer appointed to make the sale, or disregard of them, the law discountenances. He may not do anything of himself, and must do all as he is directed by the law under which he acts. He may not, by any misconstruction of it, anticipate the time for sale within which the owner of the property may prevent a sale of it, by paying the demand against him, and the expenses which may have been incurred from his not having done so before. This the law always presumes that the owner may do, until a sale has been made. He may arrest the uplifted hammer of the auctioneer when the cry for sale is made, if it be done before a *bona fide* bid has been made."¹ So, a requirement of publication for "three successive weeks in some newspaper," means a publication for twenty-one days, and not simply three insertions in a newspaper.²

¹ In *Early v. Doe*, 16 How. 610, 616, per Mr. Justice Wayne.

² *Loughbridge v. The City of Huntington*, 56 Ind. 253. See, also, as to time of publication, *Caston v. Caston*, 60 Miss. 475; *Pennell v. Monroe*, 30 Ark. 661; *Clarke v. Rowan*, 53 Ala. 400; *Moore v. Brown*, 4 McLean, 211; 11 How. 414; *Steuart v. Meyer*, 54 Md. 454; *Kellogg v. McLaughlin*, 8 Ohio, 114; *Dubuque v. Wooton*, 28 Iowa, 571; *Westbrook v. Willey*, 47 N. Y. 457; *Renshaw v. Imboden*, 31 La. Ann. 661; *Hilgers v. Quinney*, 51 Wis. 62; *Eaton v. Lyman*, 33 Wis. 34; *Cass v. Bellows*, 31 N. H. 501; 64 Am. Dec. 347; *Andrews v. People*, 83 Ill. 529; 84 Ill. 28; *Ricketts v.*

§ 1368. **Parol evidence to correct mistake.**—Where the record shows upon its face an insufficient advertisement, parol evidence is not admissible to correct the mistake.¹

§ 1369. **Date of paper.**—The date of a paper is generally to be considered as the date of its publication.² Thus, a statute required the first publication of a notice of a tax sale in a newspaper to be eight weeks prior to the day of sale. The first publication was in the number dated September 21st, giving notice of a sale for November 15th. There being one day wanting to make eight weeks, a party to a suit sought to introduce evidence to show that the paper was actually printed and ready to be delivered on the afternoon of September 20th, and was actually delivered to the subscribers in the village where the paper was published that afternoon or evening, and the residue of the issue was left in the postoffice that night directed to the other subscribers, and went out in the mail the next morning. But the court held that the publication of notice was insufficient, and the sale void, saying: "We think the true construction of the statute is that the printed date of the newspaper is generally to be regarded as the date of publication, and that there was no evidence in this case competent to show that the paper was published the day before its date. However it might be in case of fraud or mistake in the printed date, or under other peculiar circumstances, we have no doubt but that the date of the paper was intended by the legislature to be the date of publication in ordinary cases of notice in a weekly paper published on a fixed and uniform day of the week, purporting, and generally understood to be published on the day of its date, and actually

Hyde Park, 85 Ill. 110; *Hobbs v. Clements*, 32 Me. 67; *Elliott v. Eddins*, 24 Ala. 508; *Flint v. Sawyer*, 30 Me. 226; *Farrar v. Eastman*, 1 Fairf. 191; 5 Greenl. 345.

¹ *Kellogg v. McLaughlin*, 8 Ohio, 114; *Fitch v. Pinkard*, 4 Scam. 69; *Alvord v. Collin*, 20 Pick. 418.

² *Schoff v. Gould*, 52 N. H. 512.

issued so near that day as to justify the understanding that for the practical purpose of giving legal notice, that is the day of publication. Obvious reasons of convenience and certainty, and the general understanding and practice prevailing in this State, which the makers of the statute cannot be presumed to have overlooked, show that such must have been the legislative design."¹

§ 1370. **Publication in supplement.**—If a statute provides that the delinquent tax list shall be published in a newspaper published in the city and county in which the taxes are levied, or in a supplement to such newspaper, and that the time and place of commencing the sale shall be specified in such publication, the list, if published in a supplement, must be published in one, the circulation of which is coextensive with that of the paper. If the supplement is not circulated coextensively with the newspaper, but is delivered to subscribers and others within the city and county, and not to those who reside outside of the limits of the city and county, the publication is not in compliance with the statute, and a tax deed founded on such sale is void.² A decision to the same effect was made in Kentucky, where the printer printed the list on separate sheets accompanying the paper, in the first six publications in the proportion of two-thirds to the whole number of subscribers, and in the remaining publications in the proportion of about one-half. To comply with the law, the sheets should have been as numerous as the subscribers of the paper.³ If, however, the circulation of the supplement is as extensive as that of the paper itself, no objection can be taken to the publication of the list in this form.⁴

§ 1371. **Printed notices.**—If the statute requires a printed notice, a written one will not suffice.⁵ The stat-

¹ Schoff v. Gould, 52 N. H. 512.

² Tully v. Bauer, 52 Cal. 487.

³ Davis v. Simms, 4 Bibb, 465.

⁴ Zahradnicek v. Selby, 15 Neb. 579.

⁵ Lagroue v. Rains, 48 Mo. 536.

ute in force in Missouri provided that if ordered by the court, notice should be given "by posting no less than one printed handbill or advertisement in each municipal township in the county where the lands are situate." The only recital of any advertisement in the deed was that the collector proceeded by posting in the most public place in each municipal township one *written* notice, containing a list of the land, etc. The question presented to the court for decision was whether the putting up of written notices was a sufficient compliance with the law. Mr. Justice Wagner, in delivering the opinion of the court, said: "The proposition may be laid down as undoubted that the advertisement in the time and manner prescribed by law is prerequisite to the validity of a tax title; and this principle is not altered by the provision in our law requiring judgment to be entered up in the county court. Before the adoption of the present law, the officer derived his power to sell, in part, from the advertisement. Now, the court obtains its authority to proceed, in part, from the same source. Power is conferred upon the court to be exercised on certain defined and limited contingencies; and these contingencies must have happened, and the conditions on which it can act must have been performed, before its act can be valid. Its authority does not attach until the law has been pursued and complied with. The notice is the indispensable prerequisite, and, without it, the court has no jurisdiction in the premises. As the proceeding is *ex parte*, and founded upon constructive notice, a strict compliance with the law by which the court acquires jurisdiction is necessary. When the law prescribes a particular or specific manner for making advertisements or giving notices, no court or officer has a right to substitute another or a different mode. The law required that the handbill set up should be printed. Here the requirement was wholly disregarded, and written handbills were substituted. There are, doubtless, good and sufficient reasons why the notices should be printed. Some persons can read print-

ing who cannot read writing. Printed notices are calculated to attract more attention, impart a more general information, and give greater facility for examining into what land is to be sold or has become delinquent. Everything that has a tendency to inform the community, and promote competition in these sales, is essential. But, without giving reasons, it is sufficient for us to know that the law absolutely demanded that the handbills posted up should be printed, and that the officers disregarded and disobeyed its express mandates. If they could make one kind of substitution, they could another, and no person could ever know how or where to look for the protection of his rights.”¹

§ 1372. **Consent to irregularities.**—The authority of the officer to sell must be derived from a compliance with the provisions of the statute. On this ground it has been decided that a sale founded on an irregular advertisement is not valid, although the delinquent gave a verbal consent to the irregularity in the advertisement.² A person is not estopped from objecting to the validity of a tax because he paid, in previous years, taxes levied upon assessments made in the same manner.³ “One might almost as well defend an action for an assault and battery by pleading that he had beaten the plaintiff every year for many years, and that this was the first time the plaintiff had ever complained.”⁴

§ 1373. **Waiver of defects.**—But if an assessment is valid, and a person interested in the estate requests a reassessment, apportioning the taxes according to the respective interests of the parties, he cannot subsequently object to the new assessment on the ground merely that the assessors had no authority to make it.⁵ If a party to whom land has been assessed tenders a sum of money for

¹ In *Lagroue v. Rains*, 48 Mo. 536, 538.

² *Scales v. Alvis*, 12 Ala. 617; 46 Am. Dec. 269.

³ *Cruger v. Dougherty*, 43 N. Y. 107.

⁴ *Cruger v. Dougherty*, 43 N. Y. 107, 120.

⁵ *Burr v. Wilcox*, 13 Allen, 269.

the purpose of redeeming land from a tax sale, he admits, it is held, that the amount tendered is due, and waives thereby any irregularity in the assessment or sale.¹ In a case in Michigan, there was a misdescription of lands in an assessment-roll, caused by following a list furnished by the parties themselves. The court refused to allow them to claim the misdescriptions as a ground for equitable relief, but remitted them to their legal remedies.²

§ 1374. **Estoppel.**—It is held that by participating in the procurement of the passage of a local statute, by ratifying, acquiescing in, or approving it after its passage, and by receiving benefits under it, parties are estopped from denying the constitutionality of such statute. Such persons, it is held, are liable to the tax authorized by the statute, although to all other persons it may be unconstitutional and invalid.³ The fact that a tax deed shows a sale of several parcels of real estate *en masse*, and that the certificate of sale upon which such deed was executed by the officer showed a sale in parcels, does not estop the officer from denying the validity of such deed.⁴

§ 1375. **Description of land in notice of sale.**—The description of the property in the notice of sale and prior proceedings must be sufficient to enable it to be identified, and must follow the requirements of the statute. It may be well to note some instances. A de-

¹ *Burton v. Hintrager*, 18 Iowa, 348. See *Brayton v. The County of Delaware*, 16 Iowa, 44.

² *Hubbard v. Winsor*, 15 Mich. 146.

³ *Ferguson v. Landram*, 5 Bush, 236; 96 Am. Dec. 350. In this case, to avoid a draft, the people of a county met at the county seat, and resolved to raise a sum of money as a military fund, to be distributed among those who should thereafter volunteer, in addition to the bounty offered by the federal government. They appointed a committee to borrow the money, and to secure an act of legislature authorizing the issue of bonds, and the levy of a tax. See, also, *Ferguson v. Landram*, 1 Bush, 548.

⁴ *Byam v. Cook*, 21 Iowa, 392. See *Telle v. Green*, 28 Ind. 184; *Ives v. North Canaan*, 33 Conn. 402. See, also, *Buchanan v. Upshaw*, 1 How. 56; *Isaacs v. Gearheart*, 12 Mon. B. 231.

scription, "house and lot north side of Commercial street, formerly owned by Belle Creole, also brick store north side of Commercial street and second from the corner of Pine and Commercial, including lot and all the appurtenances,"—notwithstanding, that at the top of the page containing this description appear the words: "Nevada County, Nevada Township, Nevada City,"—is fatally defective, because it does not give the "metes and bounds, or describe the premises by lots or fractions of lots," as required by the statute in force at that time.¹ If land is described as the "unsold portion" of eleven square leagues of land known by a certain name, the description is fatally defective.² "The assessment must contain a true description of the land in order that the purchaser may be enabled to know what land he is purchasing, and that the owner may know from the advertisements required to precede the sale, that his land is exposed to sale, and that he may save it by paying the tax."³

§ 1376. **Illustrations.**—An assessment describing a tract by metes and bounds, and excepting from the tract parcels of this tract which had previously been conveyed, without describing the excepted portions by metes and bounds, nor in any manner whatever, except by referring to deeds placed on record, is void.⁴ "The law, in requiring an advertisement of the sale, has the double object in view—to apprise the owner that the tax is unpaid, and to invite the attention of purchasers in such manner that the land may be sold for its fair market price. To attain these objects, it is necessary that the description should be such that the owner may know that the tax on his land is unpaid, and purchasers may know or learn the precise tract intended, and be enabled to estimate its actual value."⁵ A description of land as a "part of a

¹ *Kelsey v. Abbott*, 13 Cal. 609.

² *People v. Pico*, 20 Cal. 595.

³ *Yenda v. Wheeler*, 9 Tex. 408.

⁴ *People v. Cone*, 48 Cal. 427.

⁵ *Lafferty's Lessee v. Byers*, 5 Ohio, 458, per Lane, J.

lot," or "one acre of a lot," without further words of quantity or location, is too vague and uncertain to authorize a sale.¹ In one case, the quantity of land sold, one hundred acres, was described as being the north part of lots seven and eight, section one, township thirteen, range three. The land was sold as an entire tract, and the quantity of land in each lot was not given. The law in force at the time required the list to set forth "the number of acres in each *particular* tract, lot, section, or subdivision thereof, the range, township, section, quarter-section, tract, lot, or part thereof, or the number of entry, location, survey, or watercourse, as the nature of the general or particular surveys may require, so as completely to designate or identify the same." It appeared from the evidence introduced that the two lots adjoined each other on the east and west, and had the land been conveyed by a deed by a similar description, it could have been found without difficulty. But the court said that "although this description might be sufficiently certain in a deed, it does not follow that it is sufficiently certain to sustain a sale for taxes. In order that such sales may be sustained, it is necessary that all the requisitions of the law under which they are made should have been complied with, and any departure from these requisitions will defeat the sale." The court accordingly held that the sale was void, and that the deed made in pursuance of it did not transfer any title.²

§ 1377. **Further Illustrations.**—A description, giving the original quantity of land at a certain number of acres and the quantity to be sold at a less number, is insufficient.³ So where two tenants in common owned a

¹ Lessee of Massie's Heirs v. Long, 2 Ohio, 287; 15 Am. Dec. 547.

² Lessee of Perkins v. Dibble, 10 Ohio, 433, 440; 36 Am. Dec. 97.

³ Lafferty's Lessee v. Byers, 5 Ohio 458. In this case the land in the listing for taxation and the advertisement for sale was thus described:

Name.	No. of Entry.	Original Proprietor.	Original quantity.	Water-course.	Acre.	Rate.	Tax.
John Haines.	4,401	John Haines.	170	Mad River.	73	2	392.2

lot, an advertisement purporting to sell "half of lot No. 4, in square No. 491," is not sufficient, and a sale, made in pursuance of this notice is void.¹ Said Mr. Justice McLean: "It is necessary for the interest of the owner that he should be informed of a proceeding which, unless arrested by the payment of the tax, would divest him of his property. And it was of equal, if not greater, importance, that the property should be so definitely described, that no purchaser could be at a loss to estimate its value. It is not sufficient that such a description should be given in the advertisement as would enable the person desirous of purchasing to ascertain the situation of the property by inquiry. Nor, if the purchaser at the sale had been informed of every fact necessary to enable him to fix a value upon the property; yet the sale would be void, unless the same information had been communicated to the public in the notice. Its defects, if any exist in the description of the property to be sold, cannot be cured by any communication made to bidders on the day of sale by the auctioneer. . . . What would be understood by such a description? Suppose half a square had been advertised, it not having been divided into lots, would it convey that certainty to the public, as to the precise property about to be sold, that would enable anyone to form an opinion of its value? No one could suppose that an undivided half of the square was to be sold under the notice; and which half was offered could not be determined from the advertisement. Would this be a notice under the requisites of the law? The value of a lot or half lot depends upon its situation. If one of the half lots front two streets in a populous part of the city, it is of much higher value than the other half. And this difference in value may still be greater, if the lot be situated near the middle of a square, fronting the street, and it be divided so as to cut off one-half of it from the street. It will thus be seen that it is not a matter of small importance to the person who wishes to purchase, to know which half of a lot is

¹ Ronkendorff v. Taylor's Lessee, 4 Peters, 350.

offered for sale; and as any uncertainty in this matter must materially affect the value of the property at the sale, it is of great importance to the owner that the description should be definite. That an undivided moiety of a lot may be sold for taxes, has already been stated. But would any one understand that one-half of lot No. 4 means an undivided moiety? In all cities half lots are as common as whole ones; and when a half lot is spoken of, we understand it to be a piece of ground half the size of an entire lot, and of as definite boundaries."¹ Land was described as "Caleb Cross' heirs, six hundred and forty, entry No. 1,328, lying in the twelfth district, in the first range, ninth section." The statute provided that the land should "be specially and particularly described in such return and advertisement; and it shall be the duty of the collector of public taxes to give the number of the grant or entry, with all special calls in his advertisement." Concerning this description the court said: "The words of the section, indeed, are that it shall be described by a reference to the 'grant or entry'; the meaning of which is that if the land be granted, the number of the grant shall be referred to, and if it be not granted, that the number of the entry shall be referred to, and not that in case of granted land a reference may be made by the officer, at his election, to the number either of the grant or entry."²

§ 1378. *Continued.*—A statement at the head of a notice cannot be considered as referring to the premises to be sold, or aid in the description. Such a statement merely identifies the officer's office from which and the time when the notice issued. A notice of sale describing the property as "Roberts and Randall's Addition, lot 11, blk. 20, lot 12, blk. 20," and failing to describe such lots or the addition as being in a city or a county, and not referring in any manner to the county except the notice

¹ In *Ronkendorff v. Taylor's Lessee*, 4 Peters, 350, 362.

² *Gardner v. Brown*, 20 Tenn. (1 Humph.) 354.

was headed with the title of the officer and the county in which he acted, is insufficient.¹ The following descriptions have been held to be insufficient: "Part of the two river lots joining N. Walker's and Pettingill farm, lots 1 and 2, range 1, 100 acres." "A piece of land northwesterly of and adjoining S. G. Wait's land, lot 5, range 3, 6 acres." "One-half of lot northwesterly of Luther Jackson's farm, lot 2, range 2, 50 acres." "The lot adjoining B. Walton's farm, lot 1, range 2, 85 acres." "A piece of land between A. J. Churchill and J. H. Weymouth, part of lot 7, range 3, 27 acres." "One-half island opposite S. Holmes,' 15 acres." "A part of E. A. Pollard's farm, lot 6, range 5, 25 acres." "Part of lot adjoining Josiah Hall's, lot 1, range 5, 40 acres." "The lot being southerly and joining J. P. Hopkins' and S. R. Newell's wood land, lot 3, range 4, 60 acres." "Half of lot westerly of J. S. Holmes' farm and adjoining it, lot 4, range 2, 50 acres." "A piece of land easterly of Worthly Pond, joining W. Harlen's farm, lot 7, range 5, 8 acres."² But

¹ *Bidwell v. Webb*, 10 Minn. 59; 88 Am. Dec. 56. In this case the notice was headed, "Auditor's Office, Ramsey County, Minn., St. Paul, Dec. 8, 1862." The court said: "It is impossible to determine from the description of the land in the notice what addition of Roberts and Randall is referred to. It may be an addition to St. Paul, St. Anthony, or any other place—it may be in Ramsey or any other county. The plaintiff was not informed by this notice that it was his land which was taxed, nor could bidders ascertain from the notice the locality of the land."

² *Greene v. Lunt*, 58 Me. 518. Said Mr. Justice Danforth, in delivering the opinion of the court: "The collector must obtain his information from the assessment. He has no authority to add to or take from it; nor can the assessors, after the completion of the tax, add to the description so as to make that certain which was before uncertain. The assessment must be complete in and of itself as much as a deed or contract. Parol proof may be resorted to for the purpose of applying the terms of the description to the face of the earth, but no further. It cannot supply any deficiency in the butts or bounds. These must be ascertained from what is written, and from that alone. We may suppose, as contended in the argument, that the assessors intended to assess the lot or portions of the lot owned by the person taxed, or we may learn that fact from those officers themselves. But this is not a question of intention, but one of fact. What did they do? What is the specific lot upon which the tax is made? Until we can answer these questions, and from the record, we are utterly unable to ascertain the lot to which the lien at-

the following descriptions have been held to be sufficient: "The island opposite N. Walker's and above Alden's Ferry." "Second lot from S. Holmes', lot 4, range 3, 100 acres." "Second lot from D. L. Conant's land, lot 3, range 3, 85 acres." "Larry Farm on the hill, formerly owned by S. Roberts, being part of lot 1, in ranges 3 and 4, 75 acres"; and "second lot from J. Lunt's, lot 6, range 3, 100 acres."¹

§ 1379. Capability of identification.—Land was described as "1,013.86 acres of land, being a portion of the San Pedro Rancho, bounded as follows: North by the lands of James Regan and others; east by the line of the San Pedro Rancho; south by the Pacific Ocean; and west by the lands of Richard Tobin. Also fifteen acres of land, being a portion of the San Pedro Rancho, bounded on the north by the lands of Richard Tobin; south by the lands of Felton and Patterson; west by the Pacific Ocean; east by the lands of Richard Tobin." At the time this assessment was made, the statute required that land should be assessed "by township, range, section, or fractional section; and when such land is not a congressional division or subdivision, by metes and bounds, or other description sufficient to identify it, giving an estimate of the number of acres, locality, and the improvements thereon." The court held the description insufficient, because, in the first piece, the land was described as being bounded "on the north by the lands of James Regan *and others*." "A more uncertain and indefinite boundary than this," said

taches, and the one to be sold. . . . Such a description, however it may be in a deed, when the grantor makes his own bargain, and can enter into such a contract as he pleases, is plainly insufficient in a tax title, where the lien is fixed by the assessment, and nothing is left to the discretion or election of the collector or purchaser as to the location of the particular lot sold, or the specific acres in the lot to which the sale shall attach. Under such a description the person assessed could not tell whether it was his property, or that of a stranger which was taxed. Nor would the purchaser have sufficient knowledge of the identity of the land to enable him to bid intelligently."

¹ *Greene v. Lunt*, 58 Me. 518.

the court, "can scarcely be conceived. Who the 'others' are whose lands are said to bound the tract attempted to be assessed, does not appear upon the face of the assessment, and extrinsic evidence, as we have seen, cannot be resorted to for the purpose of showing." The court also held that the south boundary of the second piece of property described was but little, if any, more certain; neither description was sufficient.¹ If the land cannot be identified from the description in the assessment, the assessment is void, and so is a sale subsequently made. The defect cannot be cured by an accurate description of the land in the report of sale.² Separate parcels of land should be separately assessed.³

§ 1380. **Other requisites of the notice of sale.**—If the statute requires that the names of the owners must be stated in the notice, the statute must be complied with.⁴

¹ *People v. Mahoney*, 55 Cal. 286. See, also, on the question of description, *Dike v. Lewis*, 4 Denio, 238; *Keane v. Cannovan*, 21 Cal. 302; 82 Am. Dec. 738; *Huntington v. C. P. R. R.*, 2 Saw. 503; *Hannel v. Smith*, 15 Ohio, 134; *Orton v. Noonan*, 23 Wis. 102; *San Francisco v. Quackenbush*, 53 Cal. 52; *Amberg v. Rogers*, 9 Mich. 332; *Brown v. Dinsmoor*, 3 N. H. 103; *Eastman v. Little*, 5 N. H. 290; *Douglas v. Daingerfield*, 10 Ohio, 152; *People v. Hyde*, 48 Cal. 431; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528; 49 Am. Dec. 189; *Curtis v. Supervisors*, 22 Wis. 167; *Tripp v. Ide*, 3 R. I. 51; *People v. Pico*, 20 Cal. 595; *Lachman v. Clark*, 14 Cal. 131; *People v. Mariposa Co.*, 31 Cal. 196; *Barton v. Gilchrist*, 19 W. Va. 223; *Nason v. Ricker*, 63 Me. 381; *Thibodaux v. Keller*, 29 La. Ann. 508; *Vaughan v. Stone*, 55 Iowa, 213; *Iowa etc. Co. v. County of Sac*, 39 Iowa, 124; *Shawler v. Johnson*, 52 Iowa, 472; *Chicago etc. R. R. Co. v. Carroll County*, 41 Iowa, 153; *Lake County v. Sulphur Bank etc. Co.*, 66 Cal. 17; *Gachett v. McCall*, 50 Ala. 307; *Poindexter v. Doolittle*, 54 Iowa, 52; *Garrick v. Chamberlain*, 97 Ill. 620; *Rougelot v. Quick*, 34 La. Ann. 123; *Milner v. Clarke*, 61 Ala. 258; *Crane v. Randolph*, 30 Ark. 579; *Oliver v. Robinson*, 58 Ala. 46.

² *Mayor etc. of Morristown v. King*, 11 Lea (Tenn.), 669. A description in the assessment as "two hundred acres of land, known as the lands of the late Israel Wiggins," is sufficiently certain: *Driggers v. Cassaday*, 71 Ala. 529. But a description as "two hundred acres of land lying in Dale county," is insufficient: *Driggers v. Cassaday*, 71 Ala. 529.

³ *Terrill v. Groves*, 18 Cal. 151; *Young v. Joslin*, 13 R. I. 675; *Cooley on Taxation* (2d ed.), 400; *Shimmin v. Inman*, 26 Me. 228; *County Commrs. of Alleghany Co. v. Union Mfg. Co.*, 61 Md. 545.

⁴ *Shimmin v. Inman*, 26 Me. 228; *Corporation of Washington v. Pratt*, 8 Wheat. 681.

If the assessment gives the name of one person as the owner, and the notice the name of another, the notice is defective.¹ If the statute requires the list to be posted, this cannot be omitted.² Where a statute required that a notice inviting sealed proposals for improving a street should be conspicuously posted for five days in the office of the officer having charge of the streets, it was decided that the notice must remain posted in that office for five official days. As the court construed the statute, the notice must be posted before 9 o'clock A. M. of the first day, the hour at which the office is to be opened, and must remain posted during the whole of the first, second, third, fourth, and until 4 o'clock of the fifth day, at which hour the closing of the office is authorized by statute.³

§ 1381. **Same subject continued.**—A requirement of the statute that the notice of sale shall be published at the courthouse door must be complied with.⁴ If the statute requires a notice to be given to the owners, and an estate is owned by several heirs, a collector of taxes, levying upon the entire estate and advertising it for sale for nonpayment of taxes, must give notice to all the heirs. If he gives notice to only one of the heirs, the sale is

¹ *Bettison v. Budd*, 21 Ark. 578. And see *Workingmen's Bank v. Lannes*, 30 La. Ann. 871; *Alvord v. Collin*, 20 Pick. 418.

² *Yenda v. Wheeler*, 9 Tex. 408; *Pitts v. Booth*, 15 Tex. 453.

³ *Himmelmänn v. Cahn*, 49 Cal. 285; *Brooks v. Satterlee*, 49 Cal. 289. In the first case, Mr. Justice Rhodes dissented, saying: "As I construe the statute, no greater period is required for the posting than for the publication of the notice. The statute has assigned one and the same period for each, and I see nothing in the nature of those acts which requires or authorizes the court to regard fractions of a day in one case, and not in the other, and thus require a longer period for the posting than for the publication of the notice."

We think that the court carry the strictness of the rule too far in requiring proof of the kind indicated. We believe, with Judge Rhodes, that the time of publication and the time of posting should be measured by the same rule, and that fractions of a day should not be considered in computing time.

⁴ *Clarke v. Rowan*, 53 Ala. 400.

void for a failure to give notice to the other heirs.¹ The court intimated, however, that if the collector had levied on the interest of the heir served with notice, and advertised for sale that interest only, the sale might have been good. But as the proceeding was against the whole estate, and upon all the interest of every heir, the sale of the interest of the heir served with notice would not have been warranted by the advertisement published, or by the notice served, and the heir served with notice could have taken this objection, if a sale of his interest alone had been made.² The Illinois statute requires, before the expiration of the time for redemption, that notice shall be served on every person in actual possession or occupancy of the property, and also the person in whose name the same was taxed, or specially assessed, if, upon diligent inquiry, he can be found in the county. Under this statute it is held that where a lot has not been assessed in the name of any person, and notice of its sale for taxes has been served upon the only person in possession of the property it will be sufficient.³ The act of Congress of 1866, in relation to internal revenue, provided that in case sufficient personal property could not be found to satisfy the taxes, the collector was authorized to collect the same by seizure and sales of real estate. The statute also provided that the officer making such seizure and sale should "give notice to the person whose estate is proposed to be sold, by giving him in hand, or by leaving at his last or usual place of abode, if he has any such within the collection district where said estate is situated, a notice, in writing, stating what particular estate is proposed to be sold, describing the same with reasonable certainty, and the time when and place where said officer proposes to sell the same." A deed offered in evidence recited that notice was served "by leaving a copy of the notice as provided by law, at the

¹ *Thurston v. Miller*, 10 R. I. 358.

² *Thurston v. Miller*, 10 R. I. 358.

³ *Garrick v. Chamberlain*, 97 Ill. 620; *Gage v. Bailey*, 102 Ill. 11.

domicile, on the estate seized as above described, and also with the administrator." The tax was a succession tax. The court held that the notice was insufficient because it did not appear "that the domicile on the estate seized was the last or usual place of abode of any of the successors," and because it inferentially appeared from other recitals in the deed that a portion of the successors resided in the same collection district in which the estate sold was situated.¹

§ 1382. *Continued.*—A collector's advertisement must be signed by him as collector. "Clearly this is an official act, and it is difficult to see how any one can act officially on paper, and not so state on the paper. The act assessing this tax was a private act. The advertisement, in this case, was not signed by Spaulding, as collector, nor did it in any way so import, and the landholders were, therefore, no way informed that the signer of that advertisement had any more right than any other man to give such notice, nor that, if he had such power, he undertook to exercise it. It is not true that every man is to be presumed to be clothed with and to be exercising an official capacity, because it seems to be needed for what he is attempting. Such a principle would sweep away all official signatures and designations."² An advertisement of sale which states erroneously the year for which the tax is assessed, is fatally defective.³ In North Carolina, the mortgagee, being the legal owner of the land mortgaged, is the person to whom notice must be given.⁴ Where property is assessed and advertised for sale in the name of two persons, the proceedings are void when such persons named as joint owners never had title to the property, but it had been owned always by one of them only.⁵ Under a Maine statute, requiring the officer to publish in certain newspapers a list of the land to be sold. with the

¹ *Peyrie v. Schreiber*, 66 Mo. 38.

² *Spear v. Ditty*, 9 Vt. 282. See *Broughton v. Journeay*, 51 Pa. St. 31.

³ *Knowlton v. Moore*, 136 Mass. 32.

⁴ *Whitehurst v. Gaskill*, 69 N. C. 449; 12 Am. Rep. 655.

⁵ *Denégre v. Gérard*, 35 La. Ann. 952.

amount of the unpaid taxes, interest, and costs, on each parcel, three weeks successively, within three months before the time of sale, he stated in his record, for the purpose of showing a compliance with this requirement: "Previous to said sale, and within three months therefrom, I caused notice of the time and place of such sale, and lists of said tracts intended for sale, with the amount of such unpaid taxes, interest, and cost on each parcel, to be published three weeks successively, as follows, viz: (1) In the *Kennebec Journal*, the State paper, a list of all said tracts. (2) In the *Ellsworth American*, a newspaper printed in the county of Hancock, a list of all said tracts which lie in that county." While the record stated that a publication was made of the amount of the unpaid taxes, interest, and cost on each parcel, it failed to state where the publication was made. The record did state that the lists were published in the papers enumerated, but contained no positive and certain statement that anything else was advertised. For these reasons the court held the record insufficient.¹ The statement in an affidavit by the publisher of a newspaper, that a notice was published in the paper for a certain length of time, is presumptive evidence, at least, that affiant knew the fact of such publication.²

§ 1383. Authority to sell.—There is no authority to sell unless all the precedent material acts required by

¹ *Tolman v. Hobbs*, 68 Me. 316.

² *Hart v. Smith*, 44 Wis. 213. See, also, as to notice of sale, *Watkins v. Inge*, 24 Kan. 612; *City Railway Co. v. Chesney*, 30 Kan. 199; *Hastings v. Columbus*, 42 Ohio St. 585; *Cuttle v. Brockway*, 32 Pa. St. 45; *Leland v. Bennett*, 5 Hill, 286; *New Orleans v. Cordeviolle*, 10 La. Ann. 723; *Virden v. Bowers*, 55 Miss. 1; *Ormsby v. Louisville*, 79 Ky. 197; *Appeal of Powers*, 29 Mich. 504; *Thweatt v. Black*, 30 Ark. 732; *Magee v. Commonwealth*, 46 Pa. St. 358; *Noyes v. Haverhill*, 11 Cush. 338; *Kelly v. Craig*, 5 Ired. 129; *Pierce v. Benjamin*, 14 Pick. 356; 25 Am. Dec. 396; *Smith v. Messer*, 17 N. H. 420; *Sutton v. Calhoun*, 14 La. Ann. 209; *Pierce v. Richardson*, 37 N. H. 306; *Porter v. Whitney*, 1 Greenl. 306; *Langdon v. Poor*, 20 Vt. 13; *Hannell v. Smith*, 15 Ohio, 134; *Ex parte Tax Sale*, 42 Md. 196; *Scott v. Watkins*, 22 Ark. 556; *Ogden v. Harrington*, 6 McLean, 418.

statute have been performed.¹ If the statute requires the county treasurer and collector to return under oath the list of delinquent lands to the county auditor, there can, in the absence of such return, be no forfeiture of such lands for nonpayment of taxes.² If the statute requires a special demand to be made before sale, the statute must be observed or the invalidity of the sale will be the result.³

§ 1384. **Limitation on sale.**—Where the statute limits the time within which a sale can be made to two years from the date of the collector's warrant, a sale made more than two years from the date of such warrant is void, although the land was duly seized and advertised within two years.⁴ A precept did not describe any land except by reference to an annexed schedule, in which the several tracts of land ordered to be sold were particularized. In a suit in ejectment, the precept was offered in evidence, but no schedule was annexed to it, nor was any proof offered that any such schedule ever existed. The court decided that the precept did not appear to have any connection with the land in dispute, or to confer on the officer any authority to sell it, and hence was irrelevant and inadmissible in evidence.⁵ The officer acts under a statutory power, which must be strictly construed, and he must perform the acts required by the statute within the time prescribed.⁶ As the power to sell land for the nonpayment of taxes is given on the condition that it must be exercised within a certain time, the legislature cannot give him power to sell after the time allowed by

¹ *Bishop v. Lovan*, 4 Mon. B. 116; *Garrett v. White*, 3 Ired. Eq. 131. See *Miner v. McLean*, 4 McLean, 138; *Homer v. Cilley*, 14 N. H. 85; *Succession of Trainor*, 27 La. Ann. 150; *Hannel v. Smith*, 15 Ohio, 134; *Gossett v. Kent*, 19 Ark. 602; *Laugohr v. Smith*, 81 Ind. 495; *Kelley v. Craig*, 5 Ired. 129.

² *Miner v. McLean*, 4 McLean, 138.

³ *Lathrop v. Howley*, 50 Iowa, 39.

⁴ *Usher v. Taft*, 33 Me. 199.

⁵ *Stewart v. Graffies*, 8 Serg. & R. 344.

⁶ *Doe v. Allen*, 67 N. C. 346.

law for that purpose has expired.¹ A tax deed, showing on its face that the land was sold on a day different from that specified by statute, is void.²

§ 1385. **Public sale.**—The sale must be public.³ If several persons agree among themselves that they will advance the money to buy at a sale for taxes, and that one of them shall purchase so as to prevent competition, and that the land shall subsequently be divided among them, equity will relieve against the purchase, as such an agreement is fraudulent.⁴ “Such combinations,” said the court, “have necessarily a direct tendency to prevent competition, which it is the duty of the legislature and the policy of the law to encourage. Over a sale of this description, the owner has no control—he cannot refuse a bid or adjourn the sale, or fix a sum below which the property shall not be struck down. The sale is managed by the agent of the State. The owner is not consulted. The highest bidder becomes the purchaser, although the sum bid be less than a hundredth part of the value of the property. This being the case, any combination which has a tendency to reduce the price of the property, by preventing competition, must operate as a fraud on the owner. The effects of such combinations cannot be controlled by any vigilance on the part of the owner. It frequently happens that large quantities of land are offered for sale on these occasions, in the absence and without the knowledge of the owners; and if such combina-

¹ *Doe v. Allen*, 67 N. C. 346.

² *Conrad v. Darden*, 4 Yerg. 307. See, also, on the question of the authority of the officer to sell, *Avery v. Rose*, 4 Dev. 549; *Iron Mfg. Co. v. Barron*, 3 N. H. 36; *Thompson v. Rogers*, 4 La. 9; *Minor v. Natchez*, 4 Smedes & M. 627; 43 Am. Dec. 488; *Lessee of Holt's Heirs v. Hemphill's Heirs*, 3 Ohio. 232; *Hinman v. Pope*, 1 Gilm. 131; *Messenger v. Germain*, 1 Gilm. 631; *Pentland v. Stewart*, 4 Dev. & B. 386; *Proprietors of Cardigan v. Page*, 6 N. H. 182; *Hollister v. Bennett*, 9 Ohio, 83; *Miller v. Hale*, 26 Pa. St. 432; *Flint v. Sawyer*, 30 Me. 226; *Spiller v. Baumgard*, 4 La. 206.

³ *Miller v. Corbin*, 46 Iowa, 150; *Jenks v. Wright*, 61 Pa. St. 410; *Stevens v. Williams*, 70 Ind. 536.

⁴ *Dudley v. Little*, 2 Ohio, 504; 15 Am. Dec. 575.

tions are permitted, all the persons present at the sale might form themselves into companies, and by an agreement not to bid against each other, might purchase in the whole of every tract offered, for the amount of tax due on it. We do not mean to say that partners cannot purchase property at a tax sale, for the convenience of the business they are engaged in, when speculation is not their object; but that a partnership or combination cannot legally be formed for the purpose of making such purchases."¹ A person may act as the agent of two purchasers at a tax sale. This cannot of itself constitute a fraudulent and illegal combination.²

§ 1386. Evidence.—The existence of a fraudulent combination among bidders cannot be established by

¹ *Dudley v. Little*, 2 Ohio, 504; 15 Am. Dec. 575. This case was cited and followed by the Supreme Court of the United States in the case of *Slater v. Maxwell*, 6 Wall. 268, in which, on page 276, Mr. Justice Field said: "It is essential to the validity of tax sales, not merely that they should be conducted in conformity with the requirements of the law, but that they should be conducted with entire fairness. Perfect freedom from all influences likely to prevent competition in the sale should be in all such cases strictly exacted. The owner is seldom present, and is generally ignorant of the proceeding until too late to prevent it. The tax usually bears a very slight proportion to the value of the property, and thus a great temptation is presented to parties to exclude competition at the sale, and to prevent the owner from redeeming when the sale is made. The proceeding, therefore, should be closely scrutinized, and whenever it has been characterized by fraud or unfairness, should be set aside, or the purchaser be required to hold the title in trust for the owner. When the objections to a tax deed consist in the want of conformity to the requirements of the statute in the proceedings at the sale or preliminary to it, or in the assessment of the tax, or in any like particulars, they may be urged at law in an action of ejectment, whether the deed be the ground upon which the recovery of the premises is sought by the purchaser, or be relied upon to defeat a recovery by the owner. In some instances equity will interpose in cases of this kind, as where the deed is by statute made evidence of title in the purchaser, or the preliminary proceedings are regular upon their face, and extrinsic evidence is required to show their invalidity. Where, however, the sale is not open to objections of this nature, but is impeached for fraud or unfair practices of officer or purchaser, to the prejudice of the owner, a court of equity is the proper tribunal to afford relief."

² *Pearson v. Robinson*, 44 Iowa, 413.

proof that there were three bidders at a tax sale, and that they did not bid one against another. The court is not to indulge in the presumption of fraud, but in the absence of evidence the court is to presume the contrary. In such a case a bidder might have obtained all the land that he desired without being compelled to bid against anyone else.¹ A tax sale is not rendered invalid by the fact that both principal and agent are present and bid at the same sale.²

§ 1387. Enjoining execution of deed.—If the collector and principal bidders enter into a combination to prevent competition, and agree that the lands shall be struck off to one of the parties for the amounts taxed against the respective tracts, the court, if bidding has been thereby prevented, will enjoin the collector from making a deed to a party to the fraudulent combination.³

§ 1388. Agreement to receive portion of taxes.—An agreement by an officer with purchasers to receive only a portion of the taxes due at the sale is illegal. A sale pursuant to such an agreement is also illegal, and cannot be rendered valid by a subsequent law declaring the sale and agreement to be valid.⁴ If, after the adjournment of a tax sale, the officer executes certificates without a sale to a pretended purchaser, in compliance with an antecedent private agreement with him, the tax title is invalid, and the deed founded upon such certificate is entirely void.⁵

§ 1389. Conduct of officer.—The officer's duty requires him, at the time and place specified in the statute, to offer each tract of land separately, so as to secure a fair competition, and to collect the taxes with a loss to the

¹ Beeson v. Johns, 59 Iowa, 166.

² Jury v. Day, 54 Iowa, 573.

³ Gage v. Graham, 57 Ill. 144.

⁴ Conway v. Cable, 37 Ill. 82; 87 Am. Dec. 240.

⁵ Truesdell v. Green, 57 Iowa, 215. A person purchasing by warranty deed, for value and without notice, in such a case will not be treated as an innocent purchaser: Truesdell v. Green, 57 Iowa, 215.

owner as small as possible. The officer cannot allow a person to choose from the tax list a part of the lands delinquent, and become the purchaser of the whole for the taxes payable, without competition. Such an agreement is contrary to equity, and a fraud upon the owner.¹ As another illustration of this same principle, if the officer, instead of selling the property at public auction, allows persons to hand to him slips of paper containing a description of the lands which they desire to purchase, and the officer, at his convenience enters these lands on his books as though they had been regularly sold at public sale, and issues to such persons certificates of sale, the sale is illegal.² An agreement to take turns at bidding so as to have but one bidder for a tract when offered for sale, invalidates the sale.³ Though there may be no positive agreement, a tacit understanding among bidders that they will not bid against each other, renders the sale invalid.⁴ In order to secure fair competition the officer cannot buy at the sale.⁵ Unless authorized by statute, a city cannot buy at a tax sale.⁶ In Iowa, separate sales at the same time for several separate years are held not to be author-

¹ *Brown v. Hogle*, 30 Ill. 119.

² *Young v. Rheinecher*, 25 Kan. 366. A tax deed based on such a sale is at least voidable: *Young v. Rheinecher*, 25 Kan. 366.

³ *Springer v. Bartle*, 46 Iowa, 688.

⁴ *Johns v. Thomas*, 47 Iowa, 441. See, also, generally, *Chandler v. Keeler*, 46 Iowa, 596; *Butler v. Delano*, 42 Iowa, 350; *Bullis v. Marsh*, 56 Iowa, 747; *Besore v. Dosh*, 43 Iowa, 211; *Harris v. Drought*, 24 Kan. 524; *Townsend etc. Bank v. Todd*, 47 Conn. 190; *Kerwer v. Allen*, 31 Iowa, 578; *Singer Mfg. Co. v. Yarger*, 12 Fed. Rep. 487.

⁵ *Clute v. Barron*, 2 Mich. 192; *Pierce v. Benjamin*, 14 Pick. 356; 25 Am. Dec. 396; *McLeod v. Burkhalter*, 57 Miss. 65; *Payson v. Hall*, 30 Me. 319; *Taylor v. Stringer*, 1 Gratt. 158; *Chandler v. Moulton*, 33 Vt. 245. But see for exceptions and modifications of this rule, *Hare v. Carnall*, 39 Ark. 196; *Fox v. Oash*, 11 Pa. St. 207; *O'Reilly v. Holt*, 4 Woods, 645; *Wells v. Jackson Mfg. Co.*, 47 N. H. 235; 90 Am. Dec. 575; *Everett v. Beebe*, 37 Iowa, 452; *Wilkins v. Benning*, 51 Ga. 9; *Haxton v. Harris*, 19 Kan. 511; *Harris v. Drought*, 24 Kan. 524; *Cole v. Moore*, 34 Ark. 582; *Ellis v. Peck*, 45 Iowa, 112.

⁶ *Logansport v. Humphrey*, 84 Ind. 467; *Champaign v. Harmon*, 98 Ill. 491.

ized.¹ A title acquired at a sale for taxes of one year, is superior to a title acquired by a sale for taxes for a prior year.²

§ 1390. **Innocent purchaser.**—But a subsequent purchaser for value, and without notice of the fraud of a combination to prevent competition, will acquire a valid title.³ The sale is not rendered void by such a combination, but merely voidable.⁴ But a grantee under a quitclaim deed from the assignee of a tax certificate, void on account of the existence of a fraudulent combination at the sale, cannot claim protection as an innocent purchaser.⁵ If certain lands were purchased at a sale under a fraudulent combination by certain parties, the purchase of other lands by other parties at the same sale is not affected thereby.⁶ If such were not the law, no one would be safe in purchasing a tax title.

§ 1391. **Sale for cash.**—An officer must sell for cash. He has no power to give credit.⁷ Where the officer ac-

¹ Shoemaker v. Lacey, 38 Iowa, 277.

² Chandler v. Dunn, 50 Cal. 15.

³ Van Shaack v. Robbins, 36 Iowa, 201; Sibley v. Bullis, 40 Iowa, 429; Martin v. Ragsdale, 49 Iowa, 589; Huston v. Markley, 49 Iowa, 162. In Van Shaack v. Robbins, 36 Iowa, 201, 205, the court said: "The manifest and unmistakable purpose and intent of the entire revenue act is to give value to and confidence in tax titles. This value and confidence would be destroyed, and the intent defeated by a holding which would render any tax title in the hands of an innocent purchaser wholly worthless and void, upon the showing of a fact which might not be in his power to ascertain in advance of his purchase."

⁴ Van Shaack v. Robbins, 36 Iowa, 201.

⁵ Watson v. Phelps, 40 Iowa, 482.

⁶ Martin v. Cole, 38 Iowa, 141; Case v. Dean, 16 Mich. 12. And see Eldridge v. Kuehl, 27 Iowa, 160.

⁷ Cushing v. Longfellow, 26 Me. 306. Said Mr. Chief Justice Whitman: "But the county treasurer, who made the sale to the defendant, was a ministerial officer. His acts may be examined. Parol testimony is admissible to affect them. He was bound to a strict performance of his duties. The proprietors of the township, as well as the public, were interested in his doings. His acts should have been no otherwise in reference to the one than to the other. It appears that in making the sale he

cepts the bid, the sale is not void because the sum bid is not paid until some time after the sale.¹ It was held in a case in Arkansas, that a collector could not receive Tennessee bank paper in payment of taxes.² An officer cannot receive in payment, for the amount of taxes and costs the promissory note of the purchaser.³ "I am aware," said Mr. Justice Burnside, "that there is much management and fraudulent perversion of the law about purchasing at treasurer's sales. It is our duty to discountenance it. The intention of the legislature is plainly and clearly expressed that, as soon as the bid is made and the hammer falls, it is the duty of the purchaser to pay the taxes and costs. If not, for the treasurer to compel the payment before the deed is acknowledged."⁴ But, if there is no agreement before the sale that a credit is to be given, and, after the sale, the officer receives a note for part of the purchase money, the sale does not become invalid.⁵

stipulated to give to the purchaser a credit of something like two, four, and six months, for the purchase money. This he was not authorized by law to do. He should have sold for cash down. Public agents authorized to make sales, in the absence of any express authority to the contrary, can do no otherwise. Those who deal with them are bound to take notice that such is the case, and become privy to the erroneous proceeding. If one deals with a private agent, even, who has not an express or implied authority to sell on credit, the title to any article purchased of such agent will not vest in the vendee, against the principal of the agent. Public agents can seldom, if ever, derive authority from implication. The plaintiffs were interested, in this instance, on having the sale made for cash. They had a right of redemption. The sale on credit might well be believed to enhance the price; so that they might, if the sale could be upheld, be compelled to pay a much greater sum for redemption than would otherwise be requisite for the purpose. They might, besides, be under the necessity, in order to a redemption, to pay the amount to one who had in fact paid nothing for the land, and who might subsequently fail to make payment for it; and so the land be subject to a resale, in order to obtain funds to open and construct the road."

¹ *Anderson v. Rider*, 46 Cal. 135.

² *Hunt v. McFadgen*, 20 Ark. 277.

³ *Donnel v. Bellas*, 34 Pa. St. 157; 10 Pa. St. 341.

⁴ In *Donnel v. Bellas*, 10 Pa. St. 341, 346.

⁵ *Longfellow v. Quimby*, 29 Me. 196; 48 Am. Dec. 525.

§ 1392. **Sale to highest bidder.**—An officer selling land at auction must sell to the highest bidder, as the term is used in tax proceedings.¹ As the term is generally used in the various statutes, the highest bidder means the person who will pay the taxes due for the least quantity of the land.² A deed showing that a sale was made to a person as one “who made the highest bid therefor,” and not as one who would take the least quantity of the land for the taxes due, is void.³ “The provision of the statute, that he shall only sell the smallest quantity of the property which any purchaser will take, and pay the judgment and costs, is intended for the protection of the taxpayer. It is almost the only security afforded him against the sacrifice of his property in his absence, even though the assessment be irregular and the tax illegal.”⁴ Under the Iowa statute, a purchaser at a tax sale offering to pay the taxes for less than the whole tract, obtains an undivided interest in the land.⁵ If the bidder offers to pay the taxes for less than the whole lot, the officer is not required to indicate to the bidders the beginning corner from which the least quantity is to be run off.⁶ If the tax has been lawfully discharged, a tax sale is void.⁷ The land must be liable for the tax to render a tax sale valid.⁸

¹ See *Bean v. Thompson*, 19 N. H. 290; 49 Am. Dec. 154; *Maxcy v. Clabaugh*, 6 Ill. 26; *Cardigan Proprietors v. Page*, 6 N. H. 182.

² *Lovejoy v. Lunt*, 48 Me. 377. And see *Peters v. Heasley*, 10 Watts, 208.

³ *Hewell v. Lane*, 53 Cal. 213; *Carpenter v. Gann*, 51 Cal. 193; *Mora v. Nunez*, 7 Saw. 455.

⁴ Per Mr. Justice Field, in *French v. Edwards*, 13 Wall. 506, 511.

⁵ *Brundige v. Maloney*, 52 Iowa, 218.

⁶ *Nance v. Hopkins*, 10 Lea (Tenn.), 508.

⁷ *Gould v. Day*, 94 U. S. 405. See, also, *Dougherty v. Dickey*, 4 Watts & S. 146; *Curry v. Hinman*, 11 Ill. 420; *Wallace v. Brown*, 22 Ark. 118; 76 Am. Dec. 421; *Walton v. Gray*, 29 Iowa, 440; *Blight v. Banks*, 6 Mon. 206; 17 Am. Dec. 136; *Jackson v. Morse*, 18 Johns. 441; 9 Am. Dec. 225; *Jones v. Gibson*, N. O. Term. Rep. 41; 7 Am. Dec. 690.

⁸ *Hollister v. Sherman*, 63 Cal. 38; *Hobson v. Dutton*, 9 Kan. 477; *Sandford v. De Camp*, 8 Watts, 542; *Bott v. Perley*, 11 Mass. 169; *Coney v. Owen*, 6 Watts, 435; *Buckley v. Osburn*, 8 Ohio, 180; *Taylor v. Miles*, 5 Kan. 498; 7 Am. Rep. 558; *Dyer v. Branch Bank of Mobile*, 14 Ala. 622; *Love v. Wilbourn*, 5 Ired. 346; *Stewart v. Corbin*, 25 Iowa, 144;

Statutes, however, exempting property from taxation must receive a strict construction.¹

§ 1393. **Separate parcels.**—The general rule is that the parcels should be sold as they are given in the list.² A sale of a separate and distinct portion of a tract of land, it is held in Maine, cannot be made to pay the taxes assessed upon the whole of it. Either the whole or an undivided fraction of the whole should be sold.³ Where there are several tracts, each must be sold separately.⁴ If a sale is made of “fourteen feet” of a certain lot, the sale is void for uncertainty. The insertion of a proper description in the certificate of purchase or deed will not cure the defect.⁵ When an entire tract is assessed, undivided interests, unless authorized by statute, cannot

Penn v. Clemans, 19 Iowa, 372. See, also, *Hardy v. Waltham*, 7 Pick. 108; *Brewster v. Hough*, 10 N. H. 138.

¹ *Providence Bank v. Billings*, 4 Pet. 514; *Kendrick v. Farquhar*, 8 Ohio, 197; *Bank of Republic v. Hamilton*, 21 Ill. 53; *Detroit etc. Society v. Mayor*, 3 Mich. 182. See, also, *Armstrong v. Treasurer of Athens Co.*, 10 Ohio, 235; *Stewart v. Davis*, 3 Murph. 244; *Biscoe v. Coulter*, 18 Ark. 423; *Hart v. Plum*, 14 Cal. 148; *Cincinnati College v. State*, 19 Ohio, 110; *Howell v. Maryland*, 3 Gill, 14; *Hannibal R. R. Co. v. Shacklett*, 30 Mo. 550; *Seymour v. Hartford*, 21 Conn. 481; *Anderson v. State*, 23 Miss. 459; *Chegaray v. Jenkins*, 3 Sandf. 409; *Portland etc. R. R. Co. v. City of Saco*, 60 Me. 196; *Platt v. Rice*, 10 Watts, 352; *Louisville Canal v. Commonwealth*, 7 Mon. B. 160; *Baltimore v. State*, 15 Md. 376; 74 Am. Dec. 572; *People v. Roper*, 35 N. Y. 629; *Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 506; *Sisters of Charity v. City of Detroit*, 9 Mich. 94; *Gordon v. The Appeal Tax Court*, 3 How. 133; *Trustees of M. E. Church v. Ellis*, 38 Ind. 3; *Vail v. Beach*, 10 Kan. 214; *St. Peter's Church v. County of Scott*, 12 Minn. 395.

² *Shaw v. Kirkwood*, 24 Kan. 476; *Hayden v. Foster*, 13 Pick. 492; *Farnham v. Jones*, 32 Minn. 7; *Kregelo v. Flint*, 25 Kan. 695; *State v. Sargeant*, 76 Mo. 557. See, also, *Ware v. Thompson*, 29 Iowa, 65; *Bal-lance v. Forsyth*, 13 How. 18; *Willey v. Scoville*, 9 Ohio, 43; *Martin v. Cole*, 38 Iowa, 141; *Walker v. Moore*, 2 Dill. 256; *Spellman v. Curtenius*, 12 Ill. 409; *Moulton v. Blaisdell*, 24 Me. 283; *Baskins v. Winston*, 24 Miss. 431; *Wallingford v. Fiske*, 24 Me. 386.

³ *Allen v. Morse*, 72 Me. 502.

⁴ *Morton v. Harris*, 9 Watts, 319. See, also, *Hayden v. Foster*, 13 Pick. 492; *Woodburn v. Wireman*, 27 Pa. St. 18; *Atkins v. Hinman*, 2 Gilm. 437.

⁵ *Roberts v. Chan Tin Pen*, 23 Cal. 259.

be sold separately.¹ As each parcel of land is chargeable with its own taxes, a sale of separate parcels in one mass is invalid.² A tax deed showing the sale of several lots in bulk is held not to be void on its face, but the deed is void if it be shown by evidence that the lots are in two separate bodies, separated by a street.³

§ 1394. **Other requisites.**—Whether several lots assessed to one owner and sold in bulk are to be regarded as one lot, it is said must be determined by the use and nature of the property. Hence, it is decided that if two lots are used and occupied for one purpose, with buildings partly on each, they may be sold together.⁴ The officer cannot sell the whole of the land, when a sale of the less would pay the tax.⁵ If property is sold at one sale for both State and county taxes, combined in a single sum, and the levy of the county taxes is illegal, the sale is void.⁶ If the land is sold for a sum exceeding that authorized by law, the sale is void.⁷ If the statute re-

¹ *Roberts v. Chan Tin Pen*, 23 Cal. 259; *Cragin v. Henry*, 40 Iowa, 158.

² *Woodburn v. Wireman*, 27 Pa. St. 18; *Andrews v. Senter*, 32 Me. 394; *Hayden v. Foster*, 13 Pick. 492; *Matthews v. Buckingham*, 22 Kan. 166; *Hall v. Dodge*, 18 Kan. 277. See, also, *Crane v. Randolph*, 30 Ark. 584; *Bouldin v. Ewart*, 63 Mo. 330; *Pettus v. Wallace*, 29 Ark. 476; *Howard v. Stevenson*, 11 Mo. App. 441.

³ *Cartwright v. McFadden*, 24 Kan. 662.

⁴ *Weaver v. Grant*, 39 Iowa, 294. See for other cases on the sale of land in separate parcels or in bulk, *McQuesten v. Swope*, 12 Kan. 32; *Jackson v. Babcock*, 16 N. Y. 246; *Greer v. Wheeler*, 41 Iowa, 85; *Farnham v. Jones*, 32 Minn. 7; *Keely v. Sanders*, 99 U. S. 441; *Springer v. United States*, 102 U. S. 586; *Rankin v. Miller*, 43 Iowa, 11; *Douthett v. Kettle*, 104 Ill. 356; *Sheafe v. Wait*, 30 Vt. 735; *Pennell v. Monroe*, 30 Ark. 661; *Lawrence v. Miller*, 86 Ill. 502; *Peirce v. Weare*, 41 Iowa, 378; *Dietrick v. Mason*, 57 Pa. St. 40.

⁵ *French v. Patterson*, 61 Me. 203; *Loomis v. Pingree*, 43 Me. 299; *French v. Edwards*, 13 Wall. 506; *Lovejoy v. Lunt*, 48 Me. 377; *Straw v. Poor*, 74 Me. 53; *Whitmore v. Learned*, 70 Me. 276; *Ainsworth v. Dean*, 21 N. H. 400; *Stead's Executors v. Course*, 4 Cranch, 403; *Lyford v. Dunn*, 32 N. H. 81; *Avery v. Rose*, 4 Dev. 549; *Crowell v. Goodwin*, 3 Allen, 535; *Jaquith v. Putney*, 48 N. H. 138; *Mason v. Fearson*, 9 How. 248.

⁶ *Hardenburgh v. Kidd*, 10 Cal. 402.

⁷ *Harper v. Rowe*, 53 Cal. 233. See, also, *McQuilkin v. Doe*, 8 Blackf.

quires a report of sale, the provisions of the statute must be complied with.¹ A requirement of the statute that the officer shall sign the return must be observed.²

§ 1395. **The certificate of sale.**—Generally, after the sale has been made, the officer delivers to the purchaser a certificate of sale, and his rights thereunder must be determined from the effect of the language of the statutes of the respective States. In Alabama, until the receipt of the deed, the purchaser has no title.³ When the certificate is executed by an officer of one State, it should be shown to entitle the certificate to admission in evidence in the courts of another State, that the person whose signature is attached to it was authorized by the laws of the State in which it was made to execute it, and that his signature is genuine.⁴ The certificate legally can state only such facts as the statute requires it to state.⁵ A strict compliance with the statute in all antecedent steps must be shown by a party claiming a right under a certificate.⁶ The certificate is not evidence of any matters which it does not recite.⁷ Generally, the right of assignment is recognized. In Iowa, a

581; *Young v. Joslin*, 13 R. I. 675; *Buttrick v. Nashua I. & S. Co.*, 59 N. H. 392; *Hutchens v. Doe*, 3 Ind. 528; *Dogan v. Griffin*, 51 Miss. 782; *Treadwell v. Patterson*, 51 Cal. 637; *Bucknall v. Storey*, 36 Cal. 67; *Stockle v. Silsbee*, 41 Mich. 615; *Beard v. Green*, 51 Miss. 856; *Naltner v. Blake*, 56 Ind. 127; *McCann v. Merriam*, 11 Neb. 241; *Genthner v. Lewis*, 24 Kan. 309; *Shattuck v. Daniel*, 52 Miss. 834; *Cuming v. Grand Rapids*, 46 Mich. 150; *Covell v. Young*, 11 Neb. 510; *Wattles v. Lapeer*, 40 Mich. 624; *Pack v. Crawford*, 29 Ark. 489.

¹ *De Quasie v. Harris*, 16 W. Va. 345; *Barton v. Gilchrist*, 19 W. Va. 223. See, also, *Burlew v. Quarrier*, 16 W. Va. 109.

² *Taylor v. French*, 19 Vt. 49. If the statute requires the officer to record and return to the town treasurer "his particular doings in the sale of unimproved lands of nonresident owners" within a specified time, a failure to comply with the provision invalidates the sale: *Shimn in v. Inman*, 26 Me. 228.

³ *Johnson v. Smith's Administrator*, 70 Ala. 108. And see *Annan v. Baker*, 49 N. H. 161.

⁴ *Ward v. Carson River Wood Co.*, 13 Nev. 44.

⁵ *Overing v. Foote*, 43 N. Y. 290.

⁶ *Dolph v. Barney*, 5 Or. 192.

⁷ *Hall v. Theisen*, 61 Cal. 526.

purchaser at a tax sale assigned his certificate to another, but the assignment was not recorded. After the expiration of three years from the time of the sale, but before receiving a deed, he executed a quitclaim deed to the owner of the property. The court decided that, the assignment being valid, the quitclaim deed conveyed no title.¹ Where the statute provides that a certificate may be transferred by the purchaser by a written assignment indorsed upon or attached to the certificate, a quitclaim deed cannot be regarded as such an assignment so as to entitle the grantee to a tax deed.² The certificate is not a negotiable instrument. The assignee acquires only the rights of the assignor as against one claiming an interest acquired from the assignor before such assignment.³ The officer has no authority to issue a deed to the assignee of a tax certificate unless the assignment has been made in the mode prescribed by the statute. Where authority to execute a tax deed does not exist, the deed is void, and the original owner of the land has the right to assail the pretended authority which attempts to divest him of his title.⁴ By the assignment, the assignee secures the rights and title of the purchaser. The latter cannot divest the assignee of the title by fraudulently procuring the certificate and erasing the assignment, and having the deed executed to himself. He cannot in equity be permitted to keep such a title.⁵

¹ *Smith v. Stephenson*, 45 Iowa, 645.

² *State v. Winn*, 19 Wis. 304; 88 Am. Dec. 689.

³ *Horn v. Garry*, 49 Wis. 464.

⁴ *Smith v. Todd*, 55 Wis. 459.

⁵ *Bird v. Jones*, 37 Ark. 195. For other cases relating to certificates of sale, see *Hibbard v. Brown*, 51 Ala. 469; *Costley v. Allen*, 56 Ala. 198; *Ferguson v. Miles*, 3 Gilm. 358; 44 Am. Dec. 702; *Billings v. Stark*, 15 Fla. 296; *Gardenhire v. Mitchell*, 21 Kan. 83; *Stout v. Keyes*, 2 Doug. (Mich.) 184; 43 Am. Dec. 465; *Stephens v. Holmes*, 26 Ark. 48; *Tilson v. Thompson*, 10 Pick. 359; *Haseltine v. Simpson*, 58 Wis. 579; *Billings v. McDermott*, 15 Fla. 60; *Light v. West*, 42 Iowa, 138; *Hemmingway v. Drew*, 47 Mich. 554; *Bryant v. Estabrook*, 16 Neb. 217; *Otoe County v. Brown*, 16 Neb. 394; *Donohoe v. Veal*, 19 Mo. 331; *Sanborn v. Cooper*, 31 Minn. 307; *McCauslin v. McGuire*, 14 Kan. 234; *Manseau v. Edwards*, 53 Wis. 457; *Potts v. Cooley*, 56 Wis. 45; *Hightower v. Freedle*, 5 Sneed,

§ 1396. **Tax deeds.**—When all the preliminary steps have been complied with, the purchaser or his assignee is entitled, if there has been no redemption, to receive a deed. In some cases the statute requires the service of notice upon the occupant of the property before the purchaser's right to a deed can accrue. The rule is that these statutes must be strictly construed. Thus, in Wisconsin, the statute provided that in certain cases no deed shall be issued, "unless a written notice shall have been served upon the owner, or upon such occupant, by the holder of such certificate, at least three months prior thereto, stating that he is the owner of such certificate, and setting forth the date thereof, and giving notice that after the expiration of three months from the service thereof, such deed will be applied for." The statute required the filing of an affidavit showing such service, and specifying particularly the time and manner of service. A notice was given which stated that the purchaser was the "holder" of the certificate, but which failed to state that he was the "owner" of it. The court held that the omission rendered the notice insufficient.¹ The affidavit of service must follow the requirements of the statute, and state the facts constituting the service, so that the court may determine that the mode of service is in compliance with law.² The deed itself is not conclusive evidence of the giving of proper notice of the expiration for the time of redemption.³ If the notice and proof of service are

312; *Smith v. Janesville*, 52 Wis. 680; *Hyde v. Kenosha County*, 43 Wis. 129; *Barton v. McWhitney*, 85 Ind. 481; *Davis v. Powell*, 13 Ohio, 320; *Stebbins v. Guthrie*, 4 Kan. 353; *Lee v. Breezly*, 54 Iowa, 660; *Gage v. Bailey*, 102 Ill. 11.

¹ *Potts v. Cooley*, 51 Wis. 353. "Both words appear in the statute," said the court, "and in such a way as to indicate a different intent in the use of the one than in the use of the other. It is to be remembered that tax titles, being under a mere naked power, are *stricti juris*. . . . In the case here presented, the statute absolutely prohibits the issuing of the tax deed, except upon the service of the requisite notice. We have no disposition to question the wisdom of the statute, or attempt to do away with its provisions by construction."

² *Price v. England*, 109 Ill. 394.

³ *Reed v. Thompson*, 56 Iowa, 455; *Wilson v. Crafts*, 56 Iowa, 450.

regular on their face, and a deed is executed accordingly, a person who attacks the validity of the deed on the ground that notice was not served as shown by the proof, or that it was not served upon the proper persons, has the burden of proof to overcome the *prima facie* evidence which the papers supply.¹

§ 1397. **Preliminary requirements.**—All the preliminary requirements essential in a tax proceeding should be complied with. A failure to do so affects the validity of the deed. Thus, for instance, a tax deed is void where it appears that the assessor, in assessing a lot owned and occupied as a single lot, arbitrarily divided it into two parts, and assessed one part to the owner and the other part to unknown owners, as such assessment to unknown owners is illegal.² Authority to execute a tax deed must be conferred by statute, or the deed is void.³ A deed may be executed, although the person to whom the land is assessed has since died.⁴ If, before the issuance of the tax deed, the land has been redeemed, the deed is void.⁵

§ 1398. **Purchaser's right to deed.**—The purchaser has a right to receive a deed when the time provided for redemption has expired, although persons under disabilities have additional time in which to make a redemption.⁶

¹ *Wilson v. Crafts*, 56 Iowa, 450. For other cases relating to notices to be served before issuance of deed, see *Gage v. Schmidt*, 104 Ill. 106; *Le Blanc v. Blodgett*, 34 La. Ann. 107; *Blackistone v. Sherwood*, 31 Kan. 35; *Heaton v. Knight*, 63 Iowa, 686; *Denike v. Rourke*, 3 Biss. 39; *Long v. Smith*, 62 Iowa, 329.

² *Bidleman v. Brooks*, 28 Cal. 72. An irregularity of this kind, as we have seen, destroys the *prima facie* evidence of the deed. See § 1384, *ante*.

³ *Smith v. Todd*, 55 Wis. 459; *Sprague v. Coenen*, 30 Wis. 209; *Knox v. Peterson*, 21 Wis. 247; *Lathrop v. Brittain*, 30 Cal. 680. As to the validity of a deed executed by a sheriff as tax collector by his under sheriff, see *Lathrop v. Brittain*, 30 Cal. 680.

⁴ *Currey v. Fowler*, 3 Marsh. A. K. 504.

⁵ *Matthews v. Buckingham*, 22 Kan. 166; *Leitzbach v. Jackman*, 28 Kan. 524.

⁶ *Wright v. Wing*, 18 Wis. 45. For cases upon the various requirements preceding the execution of the deed, see *Keene v. Houghton*, 19

An officer can be compelled by *mandamus* to execute a proper deed when the one made by him is not in compliance with law.¹ The validity of a tax deed depends upon a lawful assessment.² A deed given on the sale of property exempt from taxation is void on its face.³ If property is sold for both State and county taxes together, the entire sale, if the county taxes are illegally levied, is void.⁴

§ 1399. What the deed should contain.—A tax deed should contain the same requisites as other deeds, and such additional matters as may be necessary. When a statutory form is prescribed there must be at least a substantial compliance with it.⁵ Where the statute does not

Me. 369; *State v. Richardson*, 21 Mo. 420; *Id. v. Finneran*, 29 Kan. 569; *Walton v. Gale*, 9 Gratt. 194; *Potts v. Cooley*, 51 Wis. 353; *Terrell v. Grimmell*, 20 Iowa, 393; *Gage v. Schmidt*, 104 Ill. 106; *Mead v. Nelson*, 52 Wis. 402; *Miller v. Williams*, 15 Gratt. 213; *Jones v. Dills*, 18 W. Va. 764; *Hobbs v. Shumates*, 11 Gratt. 516; *Ockendon v. Barnes*, 43 Iowa, 615; *Swope v. Saine*, 1 Dill. 416; *McCauslin v. McGuire*, 14 Kan. 238; *Eaton v. North*, 32 Wis. 303; *Forqueran v. Donnally*, 7 W. Va. 114; *Maumas v. Bennett*, 31 La. Ann. 642; *Scheftels v. Tabert*, 46 Wis. 440; *Davis v. Jackson*, 14 W. Va. 227; *Howe v. Genin*, 57 Wis. 268; *Dreutzer v. Smith*, 56 Wis. 292; *Potts v. Cooley*, 51 Wis. 353; *Cooper v. Bushley*, 72 Pa. St. 252; *Griswold v. Wilson*, 33 Iowa, 156; *Bruce v. Schuyler*, 9 Ill. 221; 46 Am. Dec. 447; *Covel v. Young*, 11 Neb. 510.

¹ *Hewell v. Lane*, 53 Cal. 213; *Grimm v. O'Connell*, 54 Cal. 523.

² *Brady v. Seaman*, 30 Cal. 610. See, generally, the late cases, *Keefe v. Bramhall*, 3 Mackey (D. C.), 551; *Jenkins v. McTigue*, 22 Fed. Rep. 148; *McCallister v. Cottrille*, 24 W. Va. 173; *Miller v. McCullough*, 104 Pa. St. 624; *Walker v. Taylor*, 43 Ark. 543; *Wright v. Zettel*, 60 Wis. 168; *Irvin v. Smith*, 60 Wis. 175; *Parker v. Cochran*, 64 Iowa, 757; *Watt v. Donnell*, 80 Mo. 198; *Lowe v. Ekey*, 82 Mo. 286; *Spurlock v. Dougherty*, 81 Mo. 171; *Doster v. Sterling*, 33 Kan. 381; *Walker v. Boh*, 32 Kan. 354; *Ludden v. Hansen*, 17 Neb. 354; *Connolly v. Connolly*, 63 Iowa, 202. A tax sale is void when made for an amount in excess of that authorized by law: *Axtell v. Gerlach*, 67 Cal. 483. See, also, *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485.

³ *Hollister v. Sherman*, 63 Cal. 38.

⁴ *Hardenburgh v. Kidd*, 10 Cal. 402.

⁵ *Hubbell v. Campbell*, 56 Cal. 532; *Grimm v. O'Connell*, 54 Cal. 522; *Hobson v. Dutton*, 9 Kan. 477; *Boardman v. Bourne*, 20 Iowa, 134; *Maggill v. Martin*, 14 Kan. 81; *Falkner v. Dorman*, 7 Wis. 386; *Atkins v. Kinnan*, 20 Wend. 249; *Marshall v. Benson*, 48 Wis. 558; *Haynes v. Heller*, 12 Kan. 381; *Bowman v. Cockerill*, 6 Kan. 311; *Chandler v. Spear*, 22 Vt. 388; *Smith v. Hileman*, 1 Scam. 323; *Kinney v. Beverley*,

provide for certain recitals in a tax deed, such recitals are mere surplusage, and do not affect the validity of the deed.¹ But if the statute requires that the deed shall recite the year for which the taxes were due, a misrecital in the year renders the deed void.²

§ 1400. **Date, seal, etc.**—In the absence of evidence, a deed will be presumed to have been made at the proper time when not dated.³ A tax deed which literally follows the form prescribed by the statute is good, although it may not show for what year the taxes were levied.⁴ The general rule is that the deed must be sealed.⁵ There must be evidence of an assignment when a certificate of sale is made to one person and the deed to another.⁶ A certificate showing that property was assessed to a person, and to “all claimants known and unknown,” shows an invalid assessment, and may be introduced in evidence

2 Hen. & M. 531; *Krueger v. Knab*, 20 Wis. 429; *North v. Wendell*, 22 Wis. 431; *Pearce v. Tittsworth*, 87 Mo. 635; *Hopkins v. Scott*, 86 Mo. 140; *Williams v. McLanahan*, 67 Mo. 499. As to recitals under the statute of Massachusetts, see *Langdon v. Stewart*, 142 Mass. 576.

¹ *Harper v. Rowe*, 55 Cal. 132.

² *Maxcy v. Olabaugh*, 1 Gilm. 26. And see, also, *Bank of Utica v. Mercereau*, 3 Barb. Ch. 528; 49 Am. Dec. 189. Where the deed omits to recite or recites erroneously the facts required by law to be recited, it, as a general proposition, is invalid: *Doe v. Hileman*, 2 Ill. 323; *Bender v. Dugan*, 99 Mo. 126; *Duff v. Neilson*, 90 Mo. 93; *Moore v. Harris*, 91 Mo. 621; *Spurlock v. Allen*, 49 Mo. 178; *Harrington v. Worcester*, 6 Allen, 576; *Lawrence v. Zimpleman*, 37 Ark. 693; *McEntire v. Brown*, 28 Ind. 347; *Wakeley v. Mohr*, 18 Wis. 136; *McDermott v. Scully*, 27 Ark. 226; *Wambole v. Foote*, 2 Dak. 1. See, also, as to omissions of recitals, *Abbott v. Doling*, 49 Mo. 302; *Wiggin v. Temple*, 73 Me. 382; *Moore v. Harris*, 91 Mo. 616; *Baldwin v. Merriam*, 16 Neb. 199; *Haller v. Blaco*, 10 Neb. 36; *Towle v. Holt*, 14 Neb. 221; *Howard v. Lamaster*, 11 Neb. 582; *Mason v. Crowder*, 85 Mo. 526; *Haynes v. Heller*, 12 Kan. 381; *Ladd v. Dickey*, 84 Me. 190.

³ *Thompson v. Schuyler*, 2 Gilm. 271.

⁴ *Marshall v. Benson*, 48 Wis. 558. And see *Bell v. Gordon*, 55 Miss. 45; *Bonnell v. Roane*, 20 Ark. 126.

⁵ *Doty v. Beasley*, 2 Bibb, 14; *Blackwell on Tax Titles*, 366; *Sullivan v. Merriam*, 16 Neb. 157; *Seaman v. Thompson*, 16 Neb. 546; *Baldwin v. Merriam*, 16 Neb. 199; *Shelley v. Towle*, 16 Neb. 194.

⁶ *Florida Savings Bank v. Brittain*, 20 Fla. 507; *McMinn v. Whelan*, 27 Cal. 300.

to defeat a deed founded upon it, notwithstanding that the deed may be regular on its face.¹ A deed containing such a recital on its face is void.²

§ 1401. **Recitals.**—The deed should recite the power by which it is executed, and that the execution occurred at the time and place prescribed by law.³ A tax deed is invalid if it does not contain a recital of an offer at public sale on the day fixed, or does not state an adjournment.⁴ If an order of court for the sale of land at a specified time is required by statute, the absence of a recital that the sale was had in pursuance of an order of court, renders the deed invalid.⁵ A deed reciting that it was made on a day which could not have been the time for which the statute required the sale to be advertised, is not, under the Missouri statute, void on its face. The statute requires only a recital of the day on which the land was offered for sale, and while the statute provides for adjourned sales, the form of deed prescribed by statute does not require the fact of adjournment of sales from day to day to be recited.⁶ But if the recitals in a tax deed affirmatively show the rendition of no judgment against the land sold for taxes, the deed is void.⁷ If the statute prescribes a form containing certain recitals, although the recitals need not be made in the language used in the form, yet they must be substantially made. An omission to do so renders the deed invalid.⁸ For instance, where the statute prescribes a form containing a recital, “that

¹ *Daly v. Ah Geon*, 64 Cal. 512; *Hall v. Theisen*, 61 Cal. 524. See *Hearst v. Egglestone*, 55 Cal. 365.

² *Brady v. Dowden*, 59 Cal. 51.

³ *Tolman v. Emerson*, 4 Pick. 160; *Jackson v. Roberts*, 11 Wend. 425; *Thompson v. Lawrence*, 2 Baxt. 415; *Ferris v. Coover*, 10 Cal. 589; *Spurlock v. Dougherty*, 81 Mo. 171.

⁴ *Williams v. Kirkland*, 13 Wall. 309; *Wamble v. Foote*, 2 Dakota, 1; *French v. Edwards*, 13 Wall. 506.

⁵ *McDermott v. Scully*, 27 Ark. 226.

⁶ *Hill v. Atterbury*, 88 Mo. 114.

⁷ *Cuffey v. O'Reiley*, 88 Mo. 418.

⁸ *Hopkins v. Scott*, 86 Mo. 140.

the city collector did expose to public sale the real property described, for the payment of taxes, interest, and costs, then due and unpaid upon said property," the omission of the latter clause, "for the payment of taxes," etc., although the deed may contain every other recital, is a fatal defect. The argument was made that if the omitted recital could be inferred from other portions of the deed, its omission ought to be considered immaterial. The court said: "We concede that this inference can be drawn, but it does not, therefore, follow that when the legislature has required a fact to be substantially affirmed, which is not thus affirmed, that from other facts which it also requires to be substantially affirmed, and which are affirmed, and which neither perform the same office as the omitted fact, nor necessarily include it, we can infer the omitted fact, and substitute by inference what the law-making power has said must be affirmed. The office of the recital that the collector exposed the lots in question to sale 'for the payment of taxes, interest, and costs, then due and unpaid,' was to show that he exposed it to sale for the only purpose for which, under the law, he could sell it. The office of the other recitals was to show that it was in fact sold for the very purpose for which it had been offered for sale, and that the proceeds of the sale were applied to that purpose. It may be said that to hold the deed in question to be void on its face, because of its failure to state substantially a fact required to be thus stated, would be technical. The answer to this is, that the legislature has required a certain fact to be substantially stated, which in this case has not been done, and we are not authorized to eliminate from the statute a recital which the legislature has declared the deed must substantially contain, nor are we authorized to say that this or that recital required to be stated substantially in a tax deed is unnecessary and immaterial, but must, on the contrary, presume that the legislature deemed all the recitals which it required to be set out material."¹

¹ Hopkins v. Scott, 86 Mo. 140, 146, per Norton, J.

§ 1402. **Statement of facts.**—The several statutes generally require that the tax deed shall contain a statement of certain facts, the existence or performance of which is essential to the validity of the deed. These facts must be stated as facts—in such a manner that the court can see from the deed itself that the officer has complied with the statute. His conclusions as to what he deems a proper compliance with the statute amounts to nothing. Therefore, as we have previously noticed, a deed is not valid if it contains no other recital as to notice than that the lands conveyed “were advertised according to law.”¹

§ 1403. **Form of conveyance.**—When the statute authorizes the execution of a deed without requiring a particular form, a deed in the form of a common-law conveyance, and reciting the power under which it was made, is sufficient, when accompanied by proof that there has been a strict compliance with the law.² But where the statute prescribes a particular form, that form, as we have before remarked, must be followed.³ The deed should recite that it became necessary to sell the whole of the land to pay the taxes and charges, and that no person would pay the same for a smaller quantity of the land.⁴

¹ See § 1358, *ante*. *Large v. Fisher*, 49 Mo. 307; *Yankee v. Thompson*, 51 Mo. 238; *Abbott v. Doling*, 49 Mo. 302; *Spurlock v. Allen*, 49 Mo. 178.

² *Brown v. Hutchinson*, 11 Vt. 569; *Chandler v. Spear*, 22 Vt. 388; *Spear v. Ditty*, 8 Vt. 419.

³ See for authorities, § 1399, n. 1.

⁴ *Lovejoy v. Lunt*, 48 Me. 377; *Briggs v. Johnson*, 71 Me. 236; *Loomis v. Pingree*, 43 Me. 311; *French v. Patterson*, 61 Me. 203. Where the statute prescribes a particular form, it is held in many cases that the statute is mandatory: *Wellshear v. Kelley*, 69 Mo. 353; *Hopkins v. Scott*, 86 Mo. 140; *Williams v. McLanahan*, 67 Mo. 499; *Grimm v. O'Connell*, 54 Cal. 522; *Hubbel v. Campbell*, 56 Cal. 527. In other cases this strictness of construction is not followed, and it is held that a substantial compliance with the statute is all that is necessary: *Haynes v. Heller*, 12 Kan. 381; *McQuesten v. Swope*, 12 Kan. 32; *Martin v. Garrett*, 49 Kan. 131; *Bowman v. Cockrill*, 6 Kan. 311; *Mack v. Price*, 35 Kan. 134; *McCauslin v. McGuire*, 14 Kan. 248; *Heller v. Blaco*, 10 Neb. 38; *Sutton v. Stone*, 4 Neb. 319; *Doe v. Hileman*, 2 Hen. & M. 318; *Gabe v. Root*, 93 Ind. 256.

And in general, the deed should contain sufficient recital to show the authority for the sale.¹

§ 1404. **Reference to statutory provisions.**—A tax deed failing to contain the recital in the certificate of sale with reference to the time when the purchaser would be entitled to a deed, is fatally defective.² Where a certain article of a city charter provides that when property is sold for a street assessment, a deed shall be made to the purchaser, "stating therein that it is made subject to redemption as provided in this article," and provides further that the deed "must express the true consideration thereof which is the amount paid by the purchaser," a deed stating that it is made subject to redemption as provided in another article of the charter, and failing to state the true consideration, is void.³ If a tax deed is void, it

¹ *Sibley v. Smith*, 2 Mich. 486; *Wetherbee v. Dunn*, 32 Cal. 106; *Large v. Fisher*, 49 Mo. 307; *Madland v. Benland*, 24 Minn. 372; *Elston v. Kennicott*, 46 Ill. 187; *Woodward v. Sloan*, 27 Ohio St. 592; *Little v. Herndon*, 10 Wall. 26. For other cases as to the necessity of certain recitals in tax deeds under particular statutes, and the sufficiency of such recitals, see *Frentz v. Klotsch*, 28 Wis. 312; *Pleasants v. Scott*, 21 Ark. 370; 76 Am. Dec. 403; *Lain v. Cook*, 15 Wis. 446; *Miller v. Hurford*, 11 Neb. 384; *Towle v. Holt*, 14 Neb. 227; *Sutton v. Stone*, 4 Neb. 321; *Mulcahey v. Florer*, 27 Minn. 449; *Lunenburg v. Heywood Chair Co.*, 118 Mass. 540; *Hickman v. Kempner*, 35 Ark. 505; *Haller v. Blaco*, 10 Neb. 38; *McDermott v. Scully*, 27 Ark. 226; *Clarke v. Rowan*, 53 Ala. 401; *Huey v. Van Wie*, 23 Wis. 613; *Stockle v. Silsbee*, 41 Mich. 615; *White v. Flynn*, 23 Ind. 646; *Gavin v. Shuman*, 23 Ind. 32; *Philleo v. Hiles*, 42 Wis. 527; *Oconto Co. v. Jerrard*, 46 Wis. 324; *Perkins' Lessee v. Dibble*, 10 Ohio, 433; 36 Am. Dec. 97; *Brigins v. Ohandler*, 60 Miss. 862; *Spain v. Johnson*, 31 Ark. 314; *Hogins v. Brashears*, 13 Ark. 242; *Reed v. Crapo*, 127 Mass. 40; *Wakeley v. Mohr*, 18 Wis. 321; *Woodward v. Sloan*, 27 Ohio St. 592; *Woodward v. O'Shaughnessy*, 3 Lea, 724; *Brown v. Walker*, 11 Mo. App. 226; *Bowman v. Cockrill*, 6 Kan. 325; *State v. Patterson*, 11 Neb. 266; *Morrill v. Douglas*, 14 Kan. 302; *Ferris v. Coover*, 10 Cal. 589; *O'Grady v. Barnishell*, 23 Cal. 287; *Wetherbee v. Dunn*, 32 Cal. 106; *Moss v. Shear*, 25 Cal. 38; 85 Am. Dec. 94; *Bidleman v. Brooks*, 28 Cal. 72. See as to void deeds, *People v. Hastings*, 29 Cal. 449; *Hurlbutt v. Butenop*, 27 Cal. 50. See, also, *Burr v. Hunt*, 18 Cal. 303; *Kelsey v. Abbott*, 13 Cal. 609.

² *Anderson v. Hancock*, 64 Cal. 455. And see *Grimm v. O'Connell*, 54 Cal. 522; *Hubbell v. Campbell*, 56 Cal. 527.

³ *Hubbell v. Campbell*, 56 Cal. 527.

cannot be made valid by proving a valid assessment.¹ A provision of the Massachusetts statute was that "taxes assessed on real estate may, with all incidental costs and expenses, be levied by sale thereof if the tax is not paid within fourteen days after demand of payment, made either upon the person taxed or upon any person occupying the estate." The statute also required that the officer's deed "shall state the cause of sale," as well as the steps preparatory to the sale. A deed stated a demand of the tax made on the person taxed, but failed to state that payment was not made within fourteen days. The court considered that this was not a statement of a legal cause of sale, and that the defect prevented the passing of the title, such statement being a condition precedent to the operation of the deed.² "If the legal cause of the sale may be omitted in the deed," said Mr. Justice Metcalf, "and the defect be supplied by proof *aliunde*, or by admission, so may any or all of the other matters which the statute requires that the deed shall state. The collector has a mere naked power to sell real estate for nonpayment of taxes thereon, and to convey a title thereto to the purchaser; and, in such a case, the law requires that all the prerequisites to the exercise of that power must precede its exercise. Among those prerequisites to the conveyance of the estate sold is the statement in the deed of conveyance of the cause of sale. Unless a legal cause of sale is therein stated, the attempted conveyance is invalid."³ That the sale was made at the place fixed by statute should be stated.⁴

¹ *Hearst v. Egglestone*, 55 Cal. 365. See, also, *Grimm v. O'Connell*, 54 Cal. 522. The facts must be stated, and not a conclusion drawn from the facts: *Ladd v. Dickey*, 84 Me. 190; *Spurlock v. Allen*, 49 Mo. 178; *May v. Wright*, 17 Vt. 97; 42 Am. Dec. 481; *Large v. Fisher*, 49 Mo. 307; *Duncan v. Gillette*, 37 Kan. 156.

² *Harrington v. City of Worcester*, 6 Allen, 576.

³ *Harrington v. City of Worcester*, 6 Allen, 576, 578.

⁴ *Shelley v. Towle*, 16 Neb. 194; *Baldwin v. Merriam*, 16 Neb. 199. As to recitals when land is offered at private sale, see *Ludden v. Hansen*, 17 Neb. 354.

§ 1405. **Description of land.**—Greater strictness is required of the description of the land contained in a tax deed than in voluntary deeds. The land must be described with such accuracy that with ordinary and reasonable certainty the land sold can be ascertained and identified.¹ A tax deed is void for uncertainty in which the land is described as “lot 3, and the northeast quarter of the northwest quarter *less seven acres* (lot 3, and N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ less seven acres) of section five (5), township forty-eight (48), range four (4) west.”²

§ 1406. **Illustrations.**—So is a deed void for uncertainty in description, in which the description is “two hundred acres in section 2, T. 12, range 1 east.”³ So is a deed describing the land as “thirty-four acres of the southeast quarter of the southeast quarter of section two, in township twenty-four north, of range five west,

¹ Larrabee v. Hodgkins, 58 Me. 412; Bingham v. Smith, 64 Me. 450; Wilkins v. Tourtellott, 28 Kan. 825, 843; Winkler v. Higgins, 9 Ohio St. 599; Ronkendorf v. Taylor, 4 Peters, 349; Orton v. Noonan, 23 Wis. 102; Griffin v. Creppin, 60 Me. 270.

² Johnson v. Ashland Lumber Co., 52 Wis. 458. Said the court: “It is very clear from this description that there were seven acres, a part of this tract, which were not intended to be conveyed by said deed, and were not conveyed by it; and as such seven acres were in no way described, it is quite impossible to determine from the deed itself what lands are conveyed by it. The deed, in fact, purports to convey all of lot 3, and the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 5, etc., but seven acres. Suppose the two tracts contain in all seventy-seven acres, then the deed conveys seventy acres of lot 3, and the N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 5. What seventy acres are conveyed? It is quite impossible to tell from the deed itself, and there is no way to make the description certain by any reference in the deed to objects on the land, or adjoining it, which would make it certain. From the data given by the deed, it is impossible to locate the lands conveyed. We think the deed must be held void on account of the uncertainty of the description. The following cases upon the question of description in tax deeds, we think, fully sustain these views: Head v. James, 13 Wis. 641; Curtis v. Supervisors, 22 Wis. 167; Greene v. Lunt, 58 Me. 518; Inhabitants of Orono v. Veazie, 61 Me. 431; Lessee of Massie’s Heirs v. Long, 2 Ohio, 287; 15 Am. Dec. 547; Treon’s Lessee v. Emerick, 6 Ohio, 391; Stewart v. Aten, 5 Ohio St. 257; Bidwell v. Coleman, 11 Minn. 78.”

³ Yandell v. Pugh, 53 Miss. 296.

third principal meridian.”¹ So is a deed describing the land as “forty feet of lot No. 2, in block No. 2, Davenport.”² If, subsequently to the sale, there has been a change in the name of the streets, a description is sufficient which would have been correct at the time of the sale.³ A tax deed is not necessarily void because a false call has been inserted in the description of the land. The assessment or deed is not void on account of a mistake in the description, unless it is so great that it might probably mislead the owner, and prevent him from ascertaining that his land had been assessed.⁴

§ 1407. **Same subject, continued.**—Where the land is described as “Commencement Plantation, consisting of 1,330 acres,” and the names of the State and county are given, the deed is not void for uncertainty in description.⁵ A tax deed in which the description was, “the west half of the northwest quarter, and the grist and saw mills, except therefrom five acres, being west of Cedar creek, in section ten, town. ten north, of range twenty-one east, containing seventy-five acres,” was held not to be void for uncertainty, but to be good for all the land lying west of

¹ Schackleford v. Bailey, 35 Ill. 387.

² Bosworth v. Farenholz, 3 Iowa, 84. And see, also, Keane v. Canovan, 21 Cal. 291; 82 Am. Dec. 738; Garwood v. Hastings, 38 Cal. 224; Blair Land Co. v. Scott, 44 Iowa, 147; Sutton v. Calhoun, 14 La. Ann. 209; Jacks v. Chaffin, 34 Ark. 534; Sharp v. Thompson, 100 Ill. 447; 39 Am. Rép. 61; Ballance v. Forsyth, 13 How. 18; Tripp v. Ide, 3 R. I. 51; Green v. Craft, 28 Miss. 70; Poindexter v. Doolittle, 54 Iowa, 52; Flannagan v. Boggess, 46 Tex. 331; Raymond v. Longworth, 14 How. 76; Quinby v. North American Coal Co., 2 Heisk. 596; Lafferty v. Byers, 5 Ohio, 458; Harvey v. Mitchell, 31 N. H. 575; Bruce v. McBee, 23 Kan. 379; Case v. Albee, 28 Iowa, 277; Hill v. Mowry, 6 Gray, 551.

³ Pursell v. Porter, 20 La. Ann. 323.

⁴ Bosworth v. Danzien, 25 Cal. 296.

⁵ Vaughan v. Swayzie, 56 Miss. 705; Anderson v. Hancock, 61 Cal. 88. And see, generally, Tallman v. White, 2 N. Y. 66; McCready v. Lansdale, 58 Miss. 877; Johnstone v. Scott, 11 Mich. 232; Winkley v. Kaime, 32 N. H. 268; Crooks v. Whitford, 47 Mich. 283; Ives v. Campbell, 1 Mich. 308; Anderson v. Baughman, 7 Mich. 69; 74 Am. Dec. 699; Brunn v. Murphy, 29 Cal. 326; Selden v. Coffee, 55 Miss. 41; Martz v. Newton, 29 Kan. 331.

Cedar creek, the only uncertainty, if any, relating to the exception.¹ A tax deed is not void for uncertainty of description which describes the land conveyed as "Block No. 25, less a lot belonging to Bryant, 70 by 137½, in the southeasterly corner."² But a description of land in a certain county, omitting the town, is fatally defective.³ If the description at the time of the sale is so general as to be void for uncertainty, the insertion of a proper description in the certificate of purchase or deed will not cure the defect.⁴ A description of the land as "one-fourth, No. 5, R. 8, W. E. L. S.," renders the deed void on account of the vagueness of the description.⁵ A tax deed is invalid in which the premises are described as "land, east corner of Congress and Exchange streets, extending through to Market."⁶

§ 1408. Strictness of law as to description.—The rule governing descriptions in tax deeds is thus stated by Mr. Justice Ruggles: "In a deed between individuals, a part of the premises conveyed may be rejected on account of its falsity, if after its rejection there is enough left to show clearly what the owner intended to convey. In this case, if the owner of the land had executed the deed, giving the boundaries correctly, the title might have passed, although the land was falsely described as to the village in which it lay. It would then present the question what the owner intended to convey. There is no such question here. The owner conveys nothing, and does not intend to convey anything. If the officers who undertake to convey for him intend to convey lands lying in one place by a deed describing them as lying in a different place, they intend to do what the statute, under which they profess to act, does not permit. A judicial decision which

¹ Scheiber v. Kaehler, 49 Wis. 291.

² Wetherbee v. Dunn, 32 Cal. 106.

³ Campbell v. Packard, 61 Wis. 88.

⁴ Roberts v. Chan Tin Pen, 23 Cal. 259.

⁵ Larrabee v. Hodgkins, 58 Me. 412.

⁶ Bingham v. Smith, 64 Me. 450.

should sanction a title like the present would open a door to innumerable frauds.”¹ In the case just cited, the land was described as lying in the village of Lodi, when it lay, in fact, elsewhere. The tract in which it was situated was known as the village of Syracuse, known as a different place from Lodi, although both were in the same town. In another case, the name of a village, according to the recorded plat, was Wisconsin City. A tax deed described the land as “lot 7, block 17, on the survey plat of Washington City, now called Port Washington.” On proof that the place was familiarly known and recognized by citizens and conveyancers as Washington City, or Port Washington, the court held that the description was sufficient.² But a description of the land as “ten acres in lot number 26, in the eleventh range, in the town of Columbia,” renders the deed void for uncertainty.³

§ 1409. Execution of deed.—The real date of the deed is the time at which it is delivered.⁴ It is not essential to the validity of the deed that it should be acknowledged. Its execution may be otherwise proved.⁵ Unless a seal is attached, the deed is held to be inadmissible in evidence.⁶ But if there is no method prescribed by statute in which the deed is to be sealed, the officers may use their private seals.⁷ But where a seal is required by statute, a scroll is not sufficient.⁸ When tax deeds are required to be acknowledged before the county clerk, they are void if acknowledged before a notary public.⁹ It is

¹ In *Tallman v. White*, 2 Comst. 66, 72.

² *Mecklem v. Blake*, 19 Wis. 397.

³ *Harvey v. Mitchell*, 31 N. H. (11 Fost.) 575.

⁴ *Jackson v. Schoonmaker*, 2 Johns. 234; *McMichael v. Carlyle*, 53 Wis. 504.

⁵ *Dalton v. Fenn*, 40 Mo. 109; *Hogins v. Brashears*, 13 Ark. 242.

⁶ *Day v. Day*, 59 Miss. 318.

⁷ *Huston v. Foster*, 1 Watts, 477; *Watt v. Gilmore*, 2 Yeates, 330.

⁸ *Hendrix v. Boggs*, 15 Neb. 469; *Sullivan v. Merriam*, 16 Neb. 157; *Baldwin v. Merriam*, 16 Neb. 199; *Seaman v. Thompson*, 16 Neb. 546; *Shelley v. Towle*, 16 Neb. 194.

⁹ *Dunlap v. Henry*, 76 Mo. 106; *Williams v. McLanahan*, 67 Mo. 499; *Ryan v. Carr*, 46 Mo. 483.

not necessary that the date of the delivery should be stated in the acknowledgment.¹

§ 1410. **Same subject—Other particulars.**—As in the case of voluntary deeds, delivery of a deed regularly executed will be presumed from its possession.² And it would seem that where a tax deed is acknowledged, it is sufficient without witnesses.³ Where the deed is required to be made by the tax collector, the fact that the deed is signed by him as "*sheriff and tax collector*," does not render the deed void.⁴ Under a Massachusetts statute, no title, it was held, could be claimed under a tax deed, unless the deed had been acknowledged and recorded.⁵ A tax deed which recites that the sale was begun and publicly held on the first Monday of December, instead of the first Monday in October, as provided by the Iowa statute, is not void on the ground that the deed shows upon its face that the sale was made at some time not authorized by law. The officer, under the statute, had the power, and it was his duty, when from any good cause the property could not be advertised and sold on the first Monday in October, to make the sale on the first Monday of the next succeeding month in which it could be made.⁶ In Kansas, a tax deed is not void because it states that the sale was on May 6, 1870, "at the sale begun and publicly held on the first Tuesday of May, 1870," when as a matter of fact the first Tuesday fell on the third day of May.⁷ In Wisconsin, in the absence or disability of the county clerk, a deputy may sign a tax

¹ *Caruthers v. McLaran*, 56 Miss. 371.

² *Games v. Stiles*, 14 Peters, 332. See vol. 1, § 294, *ante*.

³ *Stebbins v. Guthrie*, 4 Kan. 353.

⁴ *Bell v. Gordon*, 55 Miss. 45.

⁵ *Tilson v. Thompson*, 10 Pick. 359.

⁶ *Eldridge v. Kuehl*, 27 Iowa, 160. For other cases upon the execution of deeds, see *Stierlien v. Daley*, 37 Mo. 483; *Lain v. Cook*, 15 Wis. 446; *Cutler v. Hurlburt*, 29 Wis. 152; *Dillingham v. Brown*, 39 Ala. 311; *Wakeley v. Mohr*, 18 Wis. 321; *Hardin v. Crate*, 78 Ill. 533; *Thompson v. Schuyler*, 7 Ill. 271; *Games v. Stiles*, 14 Peters, 332; *Love v. Welch*, 33 Iowa, 192; *Sully v. Kuehl*, 30 Iowa, 275.

⁷ *Harris v. Curran*, 32 Kan. 580.

deed, although the statute may confer upon him no express authority to do so.¹ The statute, in substance, must be strictly followed.² In Missouri, it is held that a tax deed executed by the county treasurer as *ex officio* collector is void and inadmissible in evidence, where there is no proof that the office of collector had devolved upon the treasurer, by the adoption by the county of township organization.³

§ 1411. Execution of deed after expiration of officer's term.—If not provided for distinctly in the statute, a question may arise as to the proper person to execute a deed after the expiration of the term of the officer who made the sale. Should the deed be made by the person who made the sale, or by his successor in office? In a case in Kentucky, it was decided that the former was the proper person to execute the deed. "The power to sell and convey land for the nonpayment of the taxes due on it," said the court, "is in its nature entire; and the officer who sells must convey, though his office may have expired before the latter act shall have been performed. The act of assembly, under which the sale in this case was made, plainly presupposes that this may be done; for it only makes no provision for the conveyance to be made by any subsequent officer, but after authorizing the sheriff or collector to sell, and directing the land to be laid off by the county surveyor, it provides that *the* sheriff or collector shall convey, and thus, by the use of the definite article, obviously alluding to the same officer who had sold, and authorizing him to convey, without regard to the circumstance whether he had gone out of office or not. The case is, indeed, in principle, analogous to that of a sale and conveyance of land under execution; and in that case it has been decided that the sheriff who had

¹ *Gilkey v. Cook*, 60 Wis. 133.

² *Russell v. Mann*, 22 Cal. 131; *Kelsey v. Abbott*, 13 Cal. 609; *Ferris v. Coover*, 10 Cal. 632.

³ *Spurlock v. Dougherty*, 81 Mo. 171. A deputy may sign the deed in the absence or disability of his principal: *Gilkey v. Cook*, 60 Wis. 133.

sold might, after he had gone out of office, convey.”¹ But in Pennsylvania, the opposite rule finds favor. In that State, a deed executed by a person after the expiration of his term of office, is considered a nullity, “as much so as if it had been executed by a stranger who never held the office.”²

§ 1412. **Comments.**—This matter is probably regulated in most of the States by the statute. But where the statute is silent, it would seem that either the officer whose term has expired, or his successor, without distinction, should have power to execute the deed. The purchaser is entitled to have his deed from some source, and we consider that the rules applicable to sales on execution should, on this question, apply to tax sales, and that the officer making the sale has power to execute a deed after the expiration of his term of office.

§ 1413. **Execution of second deed.**—If the recitals in a tax deed do not conform to the facts, the officer may execute a second deed.³ The decisions sustaining this rule are based on the principle that it is the duty of the officer to execute a good and sufficient deed of the land sold to the purchaser. He can be compelled to do this by *mandamus*, if he neglects to perform his duty. He should, therefore, be allowed to do voluntarily what the courts have power to compel him to do. Such a course can injure no one, as the deed is only, as a general proposition, *prima facie* evidence of the truth of the correction, and if the statements contained in the second deed are

¹ *Graves v. Hayden*, 2 Litt. 64, citing on the question of the power of the sheriff to execute a deed after a sale on execution, *Allen v. Trimble*, 4 Bibb, 21; 7 Am. Dec. 726. See, also, *Elkin v. The People*, 3 Scam. (4 Ill.) 207; 36 Am. Dec. 541.

² *Hoffman v. Bell*, 61 Pa. St. 444, and cases cited.

³ *Gould v. Thompson*, 45 Iowa, 456; *Gray v. Coan*, 30 Iowa, 536; *Graves v. Bruen*, 6 Ill. 167; *Dillingham v. Brown*, 38 Ala. 311; *McCready v. Sexton*, 29 Iowa, 356; 4 Am. Rep. 214; *Bulkley v. Callanan*, 32 Iowa, 461; *Corbin v. Bronson*, 28 Kan. 534; *Hurley v. Street*, 29 Iowa, 429; *Genther v. Fuller*, 36 Iowa, 604; *Douglas v. Nuzum*, 16 Kan. 515.

untrue, they can be rebutted.¹ But an officer has no power to execute a second deed containing a misstatement of the facts which have occurred prior to its execution. Such a deed would be void.²

§ 1414. **Purchaser's right to a correct deed.**—If a deed is void because it shows a sale in gross instead of in parcels, the officer may execute a second and corrected deed, showing that the sale was made in parcels, if such is the fact as manifested by the record of sales.³ To the argument that by the making of the first deed the officer exhausts his power, notwithstanding he failed to convey the title either by misrecital of the facts or otherwise, Mr. Chief Justice Cole, in delivering the opinion of the court, remarked that the answer was not difficult. "The purchaser at the sale (the proceedings prior thereto having conformed to the statute, in so far as to make them valid and binding) acquires the right to have the legal title conveyed to him at the expiration of the time of redemption (in case no redemption is made); and it is the duty of the treasurer to convey that title to him. Any act of the treasurer which comes short of conveying the title (the purchaser having the right thereto), although he may have intended to convey it, does not discharge his duty to convey, and cannot, therefore, exhaust his power. For, having the power to convey, that power must continue until he does convey. If he should make a deed void on its face, and hence *no deed*, or make a deed to the wrong person, or of the wrong parcel of land, such acts would not exhaust his power to make a valid deed to the right person for the right piece of land. For, having the power to convey the land sold to the purchaser, he can only exhaust it by the doing of that particular thing. *The right of the purchaser* to be clothed with legal title is clear and certain by the express terms of the statute; and *the power of the treasurer* to convey that title to him is also

¹ Maxcy v. Clabaugh, 1 Gilm. 26.

² Gould v. Thompson, 45 Iowa, 456.

³ McCready v. Sexton, 29 Iowa, 356; 4 Am. Rep. 214.

certain from the same statute, and that this power is a *continuing one* until exercised, or barred by limitation, is well settled, and, indeed, is undisputed. Now, this right of the purchaser is not satisfied or fulfilled until he is clothed with the legal title; nor is the duty of the treasurer performed, or his power to convey exhausted, until he does clothe the purchaser with the legal title. He may do any number of acts intending to convey, or make innumerable attempts to convey, but until he does convey the legal title he has not performed his duty, nor exhausted his power, nor satisfied the right of the purchaser. The proposition is too plain to admit of doubt, and too axiomatic to allow of demonstration. But, it is also urged that if the treasurer can make a second deed, then he can make three, thirty, or a hundred, and thereby the door to fraud will be opened wide and great confusion of titles result. The answers to this position are numerous; and, *first*, it may be remarked, that the presumption of law is, that a public officer will do his duty fairly and honestly, and not that he will act *mala fides* or fraudulently in the discharge of his clear, statutory duty; and hence, to rest an adjudication upon the presumption that he will or may act fraudulently and in disregard of his duty, is to decide upon a presumption in the face of and contrary to law. And *second*, if the treasurer's first or second deed passes the title according to the right of the purchaser, and pursuant to his duty under the statute, then any number of deeds thereafter cannot confuse the title or prejudice the owner. If there shall be one hundred good deeds to the same person for the same land, they all will only invest him with one title, and he has a right to that and cannot get more. All the deeds the purchaser may get beyond that which convey to him the title, with which he has the right to be clothed, only increase his costs and expenses and cannot strengthen his title, nor do they confuse it. Further answers it is not necessary to make. All that has been said upon this question of the right of a purchaser to have, and the duty of the treasurer to make a

second or corrected deed, has been grounded upon the idea that the proceedings prior to the deed have been such as to entitle the purchaser to demand, or authorize the treasurer to make a deed conveying the title. If there have been such acts or omissions as, under the statute, would defeat the right of the purchaser to have, and the power of the treasurer to convey, the legal title, then, of course, neither the first nor the second and corrected deed can be legally or properly made. For, in every instance, the power of the treasurer to make a deed depends upon the validity of the prior essential steps or proceedings; and his power to make a second and corrected deed must rest upon the fact of such validity, and that the correction as made, fairly and legitimately appear from the records themselves, or are properly deducible therefrom, and are not facts *in pais* merely, or resting alone in the memory of the treasurer; and certainly so, when such facts should regularly and legally be made of record.”¹

§ 1415. Who may acquire title.—A person whose duty it is to pay the taxes, cannot acquire title by a purchase at a tax sale.² The only effect that a purchase at a

¹ In *McCready v. Sexton*, 29 Iowa, 356, 382; 4 Am. Rep. 214.

² *Christy v. Fisher*, 58 Cal. 256; *Barrett v. Amerein*, 36 Cal. 322; *Cop-pinger v. Rice*, 33 Cal. 408; *Garwood v. Hastings*, 38 Cal. 216; *Kelsey v. Abbott*, 13 Cal. 609; *Reily v. Lancaster*, 39 Cal. 354; *Lacey v. Davis*, 4 Mich. 140; 66 Am. Dec. 524; *Coxe v. Wolcott*, 27 Pa. St. 154; *Smith v. Lewis*, 20 Wis. 350; *Edgerton v. Schneider*, 26 Wis. 385; *Avery v. Judd*, 21 Wis. 262; *Phelan v. Boylan*, 25 Wis. 679; *Bowman v. Eckstein*, 46 Iowa, 485; *Bassett v. Welch*, 22 Wis. 175; *Higgins v. Crosby*, 40 Ill. 260; *Oldhams v. Jones*, 5 Mon. B. 467; *Bertram v. Cook*, 32 Mich. 518; *Sav-ings & Loan Society v. Ordway*, 38 Cal. 679; *Fitzgerald v. Spain*, 30 Ark. 95; *Shay v. McNamara*, 54 Cal. 169; *McLaughlin v. Green*, 48 Miss. 175; *Haskell v. Putnam*, 42 Me. 244; *Williams v. Hilton*, 35 Me. 547; 58 Am. Dec. 729; *Carithers v. Weaver*, 7 Kan. 110; *Oliver v. Crosswell*, 42 Ill. 41; *Middletown Sav. Bank v. Bacharach*, 46 Conn. 513; *Stinson v. Rich-ardson*, 48 Iowa, 541; *Goodrich v. Kimberly*, 48 Conn. 395; *Frye v. Bank of Illinois*, 11 Ill. 367; *Matthews v. Light*, 32 Me. 305; *Brown v. Simons*, 44 N. H. 475; *Varney v. Stevens*, 22 Me. 331; *Swift v. Agnes*, 33 Wis. 228; *Taylor v. Snyder*, Walk. Ch. 492; *McMinu v. Whelan*, 27 Cal. 300; *Coxe v. Gibson*, 27 Pa. St. 160; 67 Am. Dec. 454; *Moss v. Shear*, 25 Cal. 38; 85 Am. Dec. 94; *Gould v. Day*, 94 U. S. 405; *Cooley v. Waterman*, 16 Mich. 366; *Prettyman v. Walston*, 34 Ill. 175; *Krutz v. Fisher*, 8 Kan.

tax sale by one whose duty it was to pay the tax can have, is to extinguish the tax.¹ An agent cannot acquire title to the lands under his charge by bidding at a tax sale.² A party claiming title to the land, cannot aid his title by buying at a tax sale.³

§ 1416. Purchase by party in possession.—One in possession of land claiming title, although he may be a trespasser, cannot acquire a valid tax title.⁴ A tenant in common, whether in possession or not, cannot acquire a title against his cotenants by purchasing the land held in common at a sale for the payment of taxes.⁵ But when

90; *Dunn v. Snell*, 74 Me. 24; *Gardner v. Gerrish*, 23 Me. 46; *Coombs v. Warren*, 34 Me. 89; *Fuller v. Hodgdon*, 25 Me. 243; *Haskell v. Putnam*, 42 Me. 244; *Willard v. Strong*, 14 Vt. 532; 39 Am. Dec. 240.

¹ *Williamson v. Russell*, 18 W. Va. 613; *Johnston v. Smith*, 70 Ala. 117; *Quinn v. Quinn*, 27 Wis. 168; *Foley v. Kirk*, 33 N.J. Eq. 171; *Voris v. Thomas*, 12 Ill. 442; *Haskell v. Putnam*, 42 Me. 244; *Garwood v. Hastings*, 38 Cal. 216. In *Blake v. Howe*, 1 Aiken, 306, 15 Am. Dec. 681, the editor of the American Decisions has a valuable note upon the subject of who may purchase at a tax sale.

² *Shay v. McNamara*, 54 Cal. 169; *Krutz v. Fisher*, 8 Kan. 90; *Franks v. Morris*, 9 W. Va. 664; *Bartholomew v. Leech*, 7 Watts, 472. See *Barton v. Moss*, 32 Ill. 50; *Lamb v. Irwin*, 69 Pa. St. 436; *McMahon v. McGraw*, 26 Wis. 614; *Bowman v. Officer*, 53 Iowa, 642; *Jury v. Day*, 54 Iowa, 573; *Duffit v. Tuhan*, 28 Kan. 292; *Linsley v. Sinclair*, 24 Mich. 380; *Baker v. Whiting*, 3 Sum. 475; *Schedda v. Sawyer*, 4 McLean, 181; *Wright v. Walker*, 30 Ark. 44; *Maxfield v. Willey*, 46 Mich. 52.

³ *Thomas v. Stickle*, 32 Iowa, 71; *Jacks v. Dyer*, 31 Ark. 334. See *Wambole v. Foote*, 2 Dakota, 1.

⁴ *Bassett v. Welch*, 22 Wis. 175; *Barrett v. Amerein*, 36 Cal. 322; *Busch v. Huston*, 75 Ill. 343; *Kelsey v. Abbott*, 13 Cal. 609; *Reily v. Lancaster*, 39 Cal. 357; *Garwood v. Hastings*, 38 Cal. 217; *McMinn v. Whelan*, 27 Cal. 300. See, also, *Coppinger v. Rice*, 33 Cal. 403; *Gilman v. Riopelle*, 18 Mich. 163; *Whitney v. Gunderson*, 31 Wis. 378; *Tweed v. Metcalf*, 4 Mich. 586; *Moss v. Shear*, 25 Cal. 38; 85 Cal. 94; *Bernal v. Lynch*, 36 Cal. 146; *Lacey v. Davis*, 4 Mich. 140; 66 Am. Dec. 524; *Gwynn v. McCauley*, 32 Ark. 97. And see, also, for other instances and qualifications, *Jeffery v. Hursh*, 45 Mich. 59; *Leppo v. Gilbert*, 26 Kan. 138; *Andrews v. Worcester Ins. Co.*, 5 Allen, 65; *Hunt v. Gaines*, 33 Ark. 267; *Brown v. Simons*, 44 N. H. 475; *Home Sav. Bank v. Boston*, 131 Mass. 278; *Duffit v. Tuhan*, 28 Kan. 292; *Bowman v. Cockerill*, 6 Kan. 332. And see *Blackwood v. Van Vliet*, 30 Mich. 118.

⁵ *Davis v. King*, 87 Pa. St. 261; *Butler v. Porter*, 13 Mich. 292; *Burns v. Byrne*, 45 Iowa, 288; *Page v. Webster*, 8 Mich. 263; 77 Am. Dec. 446; *Downer v. Smith*, 38 Vt. 464; *Austin v. Barrett*, 44 Iowa, 488; *Watkins*

the time for redemption has expired, a tenant can purchase the tax title from another.¹ A person in possession of the land under a mortgage cannot buy in the title at a tax sale.² Nor can a junior mortgagee acquire a title which will extinguish the lien of a senior mortgagee.³ The duty of paying the taxes rests upon the mortgagor, and he cannot derive a title from his failure to pay the taxes as against his mortgagee.⁴ As it is the duty of a tenant for life to pay all taxes that may be levied during the continuance of the tenancy, the relation that he occu-

v. Eaton, 30 Me. 529; 50 Am. Dec. 637; *Frentz v. Klotsch*, 28 Wis. 312; *Fallon v. Chidester*, 46 Iowa, 588; 26 Am. Rep. 164; *Shell v. Walker*, 54 Iowa, 388; *Weare v. Van Meter*, 42 Iowa, 128; 20 Am. Rep. 616. See, also, *Brown v. Hogle*, 30 Ill. 119; *Lewis v. Ward*, 99 Ill. 525; *Bender v. Stewart*, 75 Ind. 91; *Dubois v. Campau*, 24 Mich. 360; *Dunn v. Snell*, 74 Me. 24; *Bracken v. Cooper*, 80 Ill. 221; *Tice v. Derby*, 59 Iowa, 312; *Flinn v. McKinley*, 44 Iowa, 70; *Fair v. Brown*, 40 Iowa, 209; *Chickering v. Faile*, 38 Ill. 342; *McConnel v. Konepel*, 46 Ill. 519; *Garretson v. Scofield*, 44 Iowa, 35; *Busch v. Huston*, 75 Ill. 343; *Lloyd v. Lynch*, 28 Pa. St. 419; 70 Am. Dec. 137; *Williams v. Gray*, 3 Me. 207; 14 Am. Dec. 234; *Allen v. Poole*, 54 Miss. 323; *Maul v. Rider*, 51 Pa. St. 377; *Connecticut Mut. Life Ins. Co. v. Bulte*, 45 Mich. 113; *Anson v. Anson*, 20 Iowa, 55; 89 Am. Dec. 514; *Phelan v. Boylan*, 25 Wis. 679; *Baker v. Whiting*, 7 Sum. 476.

¹ *Keele v. Cunningham*, 2 Heisk. 288.

² *Leppo v. Gilbert*, 26 Kan. 138; *Andrews v. Worcester Ins. Co.*, 5 Allen, 65; *Brown v. Simons*, 44 N. H. 475; *Home Sav. Bank v. Boston*, 131 Mass. 278.

³ *Fair v. Brown*, 40 Iowa, 209; *Garretson v. Scofield*, 44 Iowa, 37.

⁴ *Porter v. Lafferty*, 33 Iowa, 254; *Dayton v. Rice*, 47 Iowa, 431; *Frye v. Bank of Illinois*, 11 Ill. 383; *Dunn v. Snell*, 74 Me. 22. A person who is in possession of land and claims title to the same ought to pay the taxes, and his purchase operates as payment: *Rule v. Broach*, 58 Miss. 552; *Reily v. Lancaster*, 39 Cal. 354; *Kelsey v. Abbott*, 13 Cal. 609; *Bernal v. Lynch*, 36 Cal. 135; *McMinn v. Whelan*, 27 Cal. 300; *Christy v. Fisher*, 58 Cal. 256; *Barrett v. Amerein*, 36 Cal. 322; *Garwood v. Hastings*, 38 Cal. 216; *Jacks v. Dyer*, 31 Ark. 333; *Jones v. Davis*, 24 Wis. 229; *Lybrand v. Haney*, 31 Wis. 230; *Pool v. Ellis*, 64 Miss. 555; *Stubblefield v. Borders*, 92 Ill. 279; *Rodman v. Sanders*, 44 Ark. 504; *Gwynn v. McCauley*, 32 Ark. 97; *Stears v. Hallenbeck*, 38 Iowa, 550; *Fallas v. Pierce*, 30 Wis. 443; *Whitney v. Gunderson*, 31 Wis. 359. But if the party does not claim title he is not obligated to pay taxes: *Weichselbaum v. Curlett*, 20 Kan. 709; 27 Am. Rep. 204; *Bowman v. Cockrill*, 6 Kan. 311; *Sands v. Davis*, 40 Mich. 14; *Buckley v. Taggart*, 62 Ind. 236; *Moss v. Shear*, 25 Cal. 38; 85 Am. Dec. 94; *Blakeley v. Bestor*, 13 Ill. 709; *Curtis v. Smith*, 42 Iowa, 665; *Seaver v. Cobb*, 98 Ill. 200.

pies is such that he cannot acquire a title by a failure to pay the taxes.¹ A tenant whose duty it is to pay all taxes cannot acquire a tax title during his tenancy.² But where it is not the duty of the lessee to pay the taxes, he is at liberty to purchase.³

§ 1417. Purchase by party whose land is assessed jointly with another.—If the owner of a distinct tract of land fails to pay his taxes, and the land with that of others is sold jointly for the delinquency, a purchase by him at the tax sale is void, because he was in default in failing to pay taxes properly chargeable against him.⁴ Before he is at liberty to purchase he must pay the taxes on the part owned by him. When he has done this he has the same right to acquire a title to the other part of the tract as a stranger has.⁵ But a person who is not in

¹ *Varney v. Stevens*, 22 Me. 334; *Whyte v. Nashville*, 2 Swan, 364; *Garland v. Garland*, 73 Me. 98; *Cannon v. Barry*, 59 Miss. 289; *Bidwell v. Greenshield*, 2 Abb. N. C. 431.

² *Carithers v. Weaver*, 7 Kan. 110; *Williamson v. Russell*, 18 W. Va. 613. And see *Shepardson v. Elmore*, 19 Wis. 424; *Seaver v. Cobb*, 98 Ill. 200.

³ *Weichselbaum v. Curlett*, 20 Kan. 709; 27 Am. Rep. 204; *Keith v. Keith*, 26 Kan. 42; *Duffit v. Tuhan*, 28 Kan. 296; *Ferguson v. Etter*, 21 Ark. 160; 76 Am. Dec. 361; *Bettison v. Budd*, 17 Ark. 546; 65 Am. Dec. 442. See *Waggener v. McLaughlin*, 33 Ark. 201.

⁴ *Cooley v. Waterman*, 16 Mich. 366.

⁵ *Lewis v. Ward*, 99 Ill. 525. Mr. Justice Scott, in delivering the opinion of the court, said (p. 527): "The law is well settled that certain persons, on account of their relations to the property, or their obligation to pay the taxes thereon, are forbidden by the policy of the law to become purchasers of the lands at a tax sale. The rule admits of no exception, that a purchase by one whose duty it is to pay the taxes operates as payment, and nothing more. Where it is made to appear it was the duty of the party to pay the taxes on the lands, the disqualification at once attaches, and a purchaser will not be permitted to derive an advantage from that which it was his plain duty, under the law, to do. The rule on this subject is plain, and is so just that it commends itself to the common judgment as right. The only difficulty lies in the application of the rule to particular cases. It has been extended to a case where the land of the party making the purchase was taxed as one parcel with that of another, and the whole sold together. That is precisely the case here. The whole of the north half of lot 316 was assessed to plaintiff. Of the north half of the lot plaintiff at the time owned twenty-five feet, and Woodward owned the other fifty feet. The entire tract was sold as it

possession, and whose only claim to an interest in the land is founded upon a void tax deed, has the right to purchase at a subsequent sale, and to claim title by a deed following such sale.¹ If a mortgagor has agreed to pay all taxes that may be levied on the estate, he cannot allow it to be sold for taxes, and acquire by a purchase at the sale a title against the mortgagee.²

§ 1418. Purchase by attorney.—A person who was in some suits the attorney of a deceased owner during his life is not, by this fact, prevented from purchasing.³ But his purchase of land in relation to which he has been employed, is inconsistent with the duty which he owes to his client. Although such a purchase may have been made in good faith, it nevertheless is void.⁴

§ 1419. Presumptions as to validity of deed.—Where the statute does not prescribe a different rule, no presumption can be indulged as to the regularity of the proceedings terminating in a deed. The purchaser at the tax sale is compelled to show that every material prerequisite

was assessed, as one parcel, and was purchased by Woodward, who owned, as has been seen, two-thirds of the property sold to himself. These facts bring the case clearly within the inhibition of the principle stated."

¹ *Neal v. Frazier*, 63 Iowa, 451; *Mallory v. French*, 44 Iowa, 133. See, also, *Bowman v. Cockrill*, 6 Kan. 331; *Coxe v. Gibson*, 27 Pa. St. 165; 67 Am. Dec. 454; *Blackwood v. Van Vliet*, 30 Mich. 118.

² *Dunn v. Snell*, 74 Me. 22.

³ *Pack v. Crawford*, 29 Ark. 489.

⁴ *Wright v. Walker*, 30 Ark. 44. An agent or attorney having charge of property, cannot purchase at a tax sale and obtain the title of his principal: *Woodman v. Davis*, 32 Kan. 344; *Coxe v. Wolcott*, 27 Pa. St. 154; *Bartholomew v. Leech*, 7 Watts, 472; *McMahon v. McGraw*, 26 Wis. 614; *Franks v. Morris*, 9 W. Va. 664; *Murdoch v. Milner*, 84 Mo. 96; *Morris v. Joseph*, 1 W. Va. 256; 91 Am. Dec. 386; *Barton v. Moss*, 32 Ill. 50; *Gonzalia v. Bortelsman*, 143 Ill. 634; *Wright v. Walker*, 30 Ark. 44; *Bowman v. Officer*, 26 Wis. 614. But see *Eckote v. Myers*, 41 Iowa, 324. A husband, it is held, occupies a relation of trust, and cannot obtain a title to the separate estate of his wife at a tax sale: *Laton v. Balcom*, 64 N. H. 92; *Willard v. Ames*, 130 Ind. 351. But see *Swift v. Agnes*, 33 Wis. 229.

has been complied with.¹ It must be shown that the taxes were levied, and that the officer making the sale had power to do so.² So it must be shown that the officer has taken the oath of office.³ The existence and legality of the assessment must also be shown.⁴ From the listing of the land for taxation, to the consummation of the title by delivery of the deed, every step required to be taken is a separate and independent fact, whose existence is necessary to uphold the title.⁵

§ 1420. Deed as evidence.—The burden of proof may be shifted by statute, and it is competent for the legislature to provide that a tax deed shall be *prima facie* evi-

¹ *Stoudenmire v. Brown*, 57 Ala. 481; *Cooke v. Pennington*, 15 S. C. 185; *Chamberlain v. Sutherland*, 4 Bradw. 494; *Haseltine v. Mosher*, 51 Wis. 447; *Early v. Doe*, 16 How. 610; *Howe v. Russell*, 36 Me. 115. See, also, *Hall v. Collins*, 4 Vt. 316; *Brown v. Veazie*, 25 Me. 362; *Latimer v. Lovett*, 2 Doug. 204; *Lyon v. Hunt*, 11 Ala. 295; 46 Am. Dec. 216; *Williams v. Peyton*, 4 Wheat. 77; *Doe v. Sweetser*, 2 Ind. 649; *Waldron v. Tuttle*, 3 N. H. 340; *Thatcher v. Powell*, 6 Wheat. 119; *Games v. Stiles*, 14 Peters, 322; *Stevens v. McNamara*, 36 Me. 176; 58 Am. Dec. 740; *Holt v. Hemphill*, 3 Ohio, 232; *Irving v. Brownell*, 11 Ill. 402; *Flanagan v. Grimmet*, 10 Gratt. 426; *Steuart v. Meyer*, 54 Md. 466; *Garrett v. White*, 3 Ired. Eq. 131; *Alexander v. Walter*, 8 Gill, 239; 50 Am. Dec. 688; *Conway v. Cable*, 37 Ill. 82; 87 Am. Dec. 240; *Johnson v. Elwood*, 53 N. Y. 435; *Dyer v. Boswell*, 39 Md. 465; *Alvord v. Collin*, 20 Pick. 418; *Minor v. Natchez*, 4 Smedes & M. 627; 43 Am. Dec. 488; *Cruger v. Dougherty*, 43 N. Y. 107; *Stead v. Course*, 4 Cranch, 403.

² *Jordan v. Rouse*, 1 Jones (N. C.), 119; *Pentland v. Stewart*, 4 Dev. & B. 386; *Avery v. Rose*, 4 Dev. 549; *Garrett v. White*, 3 Ired. Eq. 131; *Love v. Gates*, 4 Dev. & B. 363.

³ *Payson v. Hall*, 30 Me. 319.

⁴ *Person v. O'Neal*, 32 La. Ann. 236; *Sutton v. Calhoun*, 14 La. Ann. 209; *Renshaw v. Imboden*, 31 La. Ann. 661.

⁵ *Gavin v. Shuman*, 23 Ind. 32; *Beatty v. Mason*, 30 Md. 409; *Ellis v. Kenyon*, 25 Ind. 134; *Smith v. Kyler*, 74 Ind. 575; *Farrar v. Clark*, 85 Ind. 451. And see, also, *Griffin v. Dogan*, 48 Miss. 11; *Hunt v. McFadden*, 20 Ark. 277; *Elliott v. Eddins*, 24 Ala. 508; *Caston v. Caston*, 60 Miss. 475; *Woodbridge v. State*, 43 N. J. L. 262; *Blakeney v. Ferguson*, 8 Ark. 272; *Nalle v. Fenwick*, 4 Rand. 585; *Long v. Burnett*, 13 Iowa, 29; 81 Am. Dec. 420; *Polk v. Rose*, 25 Md. 153; 89 Am. Dec. 773; *Doughty v. Hope*, 3 Denio, 595; *Case v. Dean*, 16 Mich. 12; *Beirne v. Burdett*, 52 Miss. 795; *Moore v. Cooke*, 40 Iowa, 290; *Guisebert v. Etchison*, 51 Md. 486; *Yelverton v. Steele*, 36 Mich. 62; *Hilton v. Bender*, 69 N. Y. 75; *Hadley v. Tankersley*, 8 Tex. 12; *Coxe v. Deringer*, 82 Pa. St. 236.

dence that all the preliminary requirements of the law have been complied with.¹ But the deed should recite enough of the proceedings to show authority for the sale.² Statutes of this kind, however, are strictly construed.³ In Indiana, if a tax deed fails to show that the personal property of the person assessed had been exhausted before the sale of his real estate, the deed, unless accompanied by evidence of this fact, is not admissible as evidence of title.⁴ Unless recitals are made by statute evi-

¹ *Roby v. Chicago*, 64 Ill. 447; *Burbank v. People*, 90 Ill. 555; *Illinois Cent. R. R. Co. v. Phillips*, 55 Ill. 194; *Holmes v. Hunt*, 122 Mass. 505; 23 Am. Rep. 381; *Hart v. Smith*, 44 Wis. 223; *Dequasie v. Harris*, 16 W. Va. 354; *Orono v. Veazie*, 57 Me. 517; *Commonwealth v. Thurlow*, 24 Pick. 374; *Ogden v. Saunders*, 12 Wheat. 213; *Sullivan v. Oneida*, 61 Ill. 247; *Fales v. Wadsworth*, 23 Me. 553; *Groesbeck v. Seeley*, 13 Mich. 329; *Forbes v. Halsey*, 26 N. Y. 53; *Webb v. Den*, 17 How. 576; *Freeman v. Thayer*, 33 Me. 76; *Townsend v. Radcliffe*, 63 Ill. 11; *Wetherbee v. Dunn*, 32 Cal. 106; *Kendall v. Kingston*, 5 Mass. 524; *Williams v. Kirtland*, 13 Wall. 310; *Pillon v. Roberts*, 13 How. 472; *Flanagan v. Grimmet*, 10 Gratt. 421; *Morton v. Reeds*, 6 Mo. 74; *Broughton v. Sherman*, 21 Minn. 431; *Steadman v. Planter's Bank*, 2 Eng. 426; *Cairo & T. R. R. Co. v. Parks*, 32 Ark. 147; *Graves v. Bruen*, 11 Ill. 431; *Stoudenmire v. Brown*, 57 Ala. 481; *Lassitter v. Lee*, 68 Ala. 287; *Greene v. Williams*, 58 Miss. 752; *Hardie v. Chrisman*, 60 Miss. 671; *Jackson v. Shepard*, 7 Cowen, 88; 17 Am. Dec. 502; *Jones v. Devore*, 8 Ohio St. 430; *Rhodes v. Gunn*, 35 Ohio St. 387; *Fuller v. Armstrong*, 53 Iowa, 683. See, also, *Hogins v. Brashears*, 13 Ark. 242; *Thweatt v. Black*, 30 Ark. 732; *Patrick v. Davis*, 15 Ark. 363; *Merrick v. Hutt*, 15 Ark. 331; *Thorn-ton v. Smith*, 36 Ark. 508; *Biscoe v. Coulter*, 18 Ark. 423; *Norris v. Russell*, 5 Cal. 249; *Early v. Whittingham*, 43 Iowa, 164; *Easton v. Savery*, 44 Iowa, 655; *Genther v. Fuller*, 36 Iowa, 604; *McCready v. Sexton*, 29 Iowa, 656; *Hobson v. Dutton*, 9 Kan. 477; *Ide v. Finneran*, 29 Kan. 569; *McCauslin v. McGuire*, 14 Kan. 234; *Gardenhire v. Mitchell*, 21 Kan. 87; *Bowman v. Cockrill*, 6 Kan. 311; *Young v. Rheinecher*, 25 Kan. 367; *Allen v. Robinson*, 3 Bibb, 326; *Hord v. Bodley*, 1 Marsh. J. J. 79; *Westbrook v. Willey*, 47 N. Y. 457; *Doughty v. Hope*, 3 Denio, 594; *Sheehy v. Hinds*, 27 Minn. 259; *Striker v. Kelly*, 2 Denio, 323; *O'Grady v. Barnishel*, 23 Cal. 287; *Ives v. Kimball*, 1 Mich. 308; *Marshall v. Benson*, 48 Wis. 598; *Greve v. Coffin*, 14 Minn. 345; 100 Am. Dec. 229; *Colman v. Shattuck*, 62 N. Y. 348; *Virden v. Bowers*, 55 Miss. 1.

² *Turney v. Yeoman*, 14 Ohio, 208; *Woodward v. Sloan*, 27 Ohio St. 592.

³ *Shoalwater v. Armstrong*, 9 Humph. 217; *Moulton v. Blaisdell*, 24 Me. 283; *Dequasie v. Harris*, 16 W. Va. 354; *Carlisle v. Longworth*, 5 Ohio, 368; *Gavin v. Shuman*, 23 Ind. 32; *Parker v. Smith*, 4 Blackf. 70; *Stierlin v. Daly*, 37 Mo. 483; *Garrett v. Wiggins*, 2 Ind. 335.

⁴ *Ward v. Montgomery*, 57 Ind. 276.

dence of the facts recited, they do not show that such facts existed, and the party claiming under the deed must prove that the requirements of the statute as to tax proceedings have been complied with.¹ In California, a recital in a tax deed as to the person to whom the land is assessed is conclusive of such fact.²

§ 1421. *Prima facie* evidence.—Where there is no statute providing that the recitals in a tax deed shall pass title to the land and shall be *prima facie* evidence of title, the party claiming under the deed has the burden of proving the truth of the recitals.³ Showing that the assessment was illegal will overcome the *prima facie* evidence of title supplied by the recitals of the tax deed.⁴ If a statute debars a claimant of land from disputing a tax title unless he shows that at the time of the sale or subsequently he, or the person through whom he claims, held a title acquired from the State or the United States, the claimant establishes a *prima facie* case by producing such evidence as raises a presumption of title in him.⁵ The *prima facie* evidence of sale furnished by a deed may be rebutted by proof that there was no public sale, and that the alleged sale took place at a time to which the prior sale had not been adjourned.² The effect of a tax deed as *prima facie* evidence of the regularity of the proceedings on which it is based, is not affected by the fact that it was taken out by the defendant during the pendency of an

¹ *Worthing v. Webster*, 45 Me. 270; 71 Am. Dec. 543. And see generally *Wright v. Cradlebaugh*, 3 Nev. 349; *Dubois v. Campau*, 24 Mich. 360; *Smith v. Bodfish*, 27 Me. 289; *Rackliff v. Look*, 69 Me. 520; *Lawrence v. Zimpleman*, 37 Ark. 644; *Smith v. Corcoran*, 7 La. 46; *Polk v. Rose*, 25 Md. 153; 89 Am. Dec. 773; *Williams v. Peyton*, 4 Wheat. 77; *Games v. Stiles*, 14 Pet. 322; *Early v. Doe*, 16 How. 619; *Jesse v. Preston*, 5 Gratt. 120; *Garrett v. Wiggins*, 1 Scam. 335; 30 Am. Dec. 653; *Cooke v. Pennington*, 15 S. C. 193; *Harvey v. Mitchell*, 31 N. H. 575; *Gage v. Lightburn*, 93 Ill. 248.

² *Brady v. Dowden*, 59 Cal. 51.

³ *Pierce v. Low*, 51 Cal. 580.

⁴ *Bidleman v. Brooks*, 28 Cal. 72.

⁵ *Gamble v. Horr*, 40 Mich. 561.

⁶ *Thompson v. Ware*, 43 Iowa, 455.

action. The burden of proving irregularity is cast upon the plaintiff.¹

§ 1422. **Dead as conclusive evidence.**—It may be provided by statute that a tax deed shall be conclusive evidence of the regularity of prior proceedings.² But it is held that a law making a tax deed conclusive evidence of the regularity of the essential prerequisites for the exercise of the taxing power is unconstitutional, as such a law deprives a person of his property without due process of law.³ The statute in Idaho Territory provided

¹ *Hart v. Smith*, 44 Wis. 213.

² *McCready v. Sexton*, 29 Iowa, 357; 4 Am. Rep. 214; *Madson v. Sexton*, 37 Iowa, 532; *Allen v. Armstrong*, 16 Iowa, 508; *Jeffrey v. Brokaw*, 35 Iowa, 505; *Magruder v. Esmay*, 35 Ohio St. 221; *White v. Flynn*, 23 Ind. 46; *Abbott v. Lindenbower*, 42 Mo. 162; *Rima v. Cowen*, 31 Iowa, 125; *Easton v. Perry*, 37 Iowa, 681; *Smith v. Easton*, 37 Iowa, 584; *Woodbridge v. State*, 43 N. J. L. 262; *Clark v. Thompson*, 37 Iowa, 536; *Gould v. Thompson*, 45 Iowa, 451; *Shawler v. Johnson*, 52 Iowa, 476; *Parker v. Sexton*, 29 Iowa, 421; *Huey v. Van Wie*, 23 Wis. 613; *Scofield v. McDowell*, 47 Iowa, 467; *Bullis v. Marsh*, 56 Iowa, 747; *Smith v. Cleveland*, 17 Wis. 556; *Hurley v. Powell*, 31 Iowa, 64.

³ *McCready v. Sexton*, 29 Iowa, 356; 4 Am. Rep. 214; *Powers v. Fuller*, 30 Iowa, 476. This question was very thoroughly considered in the case of *McCready v. Sexton*, 29 Iowa, 356, 388; 4 Am. Rep. 214. Mr. Chief Justice Cole, after examining some of the prior cases in which the question had been referred to, said: "Let us now examine the question more carefully and critically in the light of both principle and precedent. The right of taxation and the right of eminent domain are the highest sovereign rights. They are essential to and necessarily inhere in every sovereign power. They are different rights, and are differently exercised, and, though absolute and sovereign in their character, they are nevertheless to be exercised only in accordance with certain fundamental principles. And although the taking of property by taxation is not strictly, or in its technical sense, the taking of property by due process of law, yet it has never been held or claimed that the legislature might confiscate property for the nonpayment of taxes thereon. A process prescribed by law has ever been held necessary in order to the rightful exercise of the taxing power. No person has ever claimed, and certainly no court has ever decided, that it would be competent for a legislature to declare that if the owner of real estate failed to pay the proportion of taxes due thereon, on or before a date named, that any other person might pay the taxes and thereby become owner of the land. But, on the contrary, it has ever been held that certain steps must be taken before the right to demand the tax, or to sell the property for the nonpayment thereof, arose. These acts, it is true, are such as are absolutely

that "any deed derived from a sale of real estate, under the provisions of this act, shall be conclusive evidence of title, except as against actual frauds, or prepayment of the taxes upon which such sale was made." But the

relatively necessary in order to ascertain and fix the proper amount of taxes chargeable to each item of property. These steps, while they are not by the books technically 'due process of law,' nevertheless are very analogous to the steps ordinarily attending judicial proceedings *in rem*. There is, *first*, the *listing and assessing* of the property. These may be likened to the seizure of property by judicial process, whereby the jurisdiction over the *rem* attaches. Then, *secondly*, there is the *levy* of the tax upon the property, in proportion to its value, so much per centum. This may be likened to a judgment *in rem*, condemning the property to the payment of the claim for which it was seized. Then, *thirdly*, there is the *tax warrant*; or an express statutory provision, authorizing the collector to sell the property for the payment of the taxes thus levied upon it. This is very like the order or execution issued by a court for the sale of the *rem*, which had before been seized and condemned by it. Then, *fourthly*, there is the *sale* of the property by the collector under the authority conferred by the tax warrant under the statute, or by the statute itself directly. This is like the sale of the *rem* by the officer under the order or execution issued by the court. These, it must readily be seen, are essential to the exercise of the taxing power, and no revenue law could be of practical effect without them, and it may safely be said that every revenue law contains them. This *listing* is necessary, in order to describe and identify the property; the *assessing*, in order to ascertain its value; the *levy*, in order to fix the proportion or rate of the tax; the *tax warrant* or statutory provision, in order to authorize some person to receive the taxes, and to sell in default of payment; and the *sale*, in order to contract the property to one who will pay the taxes due upon it. These are essential and jurisdictional, and every other provision of every revenue law may safely be said to be directory only, and not essential to the exercise of the taxing power. The legislature may prescribe the time or manner in which these essential and jurisdictional acts shall be done, but it cannot, either constitutionally or in the nature of things, provide for passing the title to property for the nonpayment of taxes without them. As to the time or manner in which they shall be done, the discretion of the legislature is absolute and supreme, and cannot be judicially controlled or interfered with. Having the right to prescribe the manner, it may also rightfully provide that a failure to comply with its directions as to the manner shall not defeat the end; or that no person shall question the legality of the manner; or that any subsequent act or fact shall be either *prima facie* or *conclusive* evidence that the law as to time or manner was complied with. In other words, the legislature being supreme, may prescribe the time and manner of doing the act, and may make that, or any other time or manner, which the persons doing it may adopt, legal and sufficient. But this power of the legislature extends only to those things over which it is supreme. As to

court decided that, under this statute, a party was not precluded from showing that the lands were not liable to taxation, or that, in fact, the lands had not been assessed for the year for the taxes of which they had been sold.¹ While a deed may not be conclusive evidence of the existence of jurisdictional matters, it may be of the manner in which jurisdictional powers have been exercised.² Thus, the deed cannot be made conclusive evidence of the *fact* of assessment.³ It cannot be made conclusive evidence of the manner of the assessment, so as to obviate inaccuracy or indefiniteness in description upon the assessor's books, and identify the land which has been sold with that which has been assessed.⁴ Under the Iowa statute, a tax deed is not conclusive evidence of the giving of proper notice for the expiration of the time for redemption.⁵

§ 1423. **Illegal sale.**—And it is always competent to show fraud either on the part of the officer conducting

the essential and jurisdictional facts, so to speak, which the legislature cannot annul or change, it cannot excuse the nonperformance of them, and, of course, cannot make the doing of any other thing a substitute for them or conclusive evidence of their being done. To restate the proposition succinctly: Whatever the legislature is at liberty to authorize or not, it may waive or estop denial; but not so as to that which it must require. It follows, therefore, upon principle, that it is not competent for the legislature to make the tax deed *conclusive* evidence of a compliance with the essential prerequisites we have above named. That such an enactment is in conflict with the constitutional provision above quoted. That it deprives a man of his property without due process of law. Not that the exercise of the power of taxation is or is not due process of law; but that, in a suit between the tax purchaser, or his vendee, and the owner, which is a judicial investigation, 'due process of law' means a trial; and a trial involves the right of both parties to produce evidence. If one party only is allowed to produce evidence, and the other is estopped or concluded from producing his, such denial is effectually depriving him of his property without due process of law."

¹ Quivey v. Lawrence, 1 Idaho, N. S., 313.

² Martin v. Cole, 38 Iowa, 141.

³ Immegart v. Gorgas, 41 Iowa, 439; Easton v. Savery, 44 Iowa, 654; Phelps v. Meade, 41 Iowa, 470; Nichols v. McGlathery, 43 Iowa, 189.

⁴ Immegart v. Gorgas, 41 Iowa, 439.

⁵ Reed v. Thompson, 56 Iowa, 455; Wilson v. Crafts, 56 Iowa, 450.

the sale or on the part of the purchaser.¹ In Maine, the statute provided that, in an action involving the validity of a tax sale, the production of the tax deed in evidence, duly executed and recorded, should entitle the party to judgment, unless the contestant should prove payment or tender of the amount of the taxes and legal charges and interest thereon, and then he might be permitted to prosecute or defend. But the court said that "it could never have been the intention of the legislature to make a deed, which, upon its very face, shows the sale to have been illegal, evidence of title for any purpose. Such a deed does not prove, it disproves, the demandant's title, and shows that he is not entitled to prevail. It cannot be necessary for the adverse party to produce evidence to defeat the demandant's title, when, by his own showing, he has no title."²

§ 1424. **What title passes by tax deed.**—A tax deed if regularly made vests the title in the purchaser.³ But a void sale, of course, passes no title.⁴ Where more land is conveyed than was assessed or advertised for taxes, the deed is not good as an effectual conveyance.⁵ If it is necessary under the law to sell separate parcels of land

¹ *Butler v. Delano*, 42 Iowa, 350.

² *Allen v. Morse*, 72 Me. 502. See, also, *Wiggin v. Temple*, 73 Me. 380; *Orono v. Veazie*, 57 Me. 517. See, also, as to the effect of various statutes, *Bell v. Coats*, 54 Miss. 538; *Griffin v. Dogan*, 48 Miss. 11; *Virden v. Bowers*, 55 Miss. 1; *Cooke v. Pennington*, 15 S. C. 185; *Powers v. Penny*, 59 Miss. 5; *People v. Lansing*, 55 Cal. 393; *Morrill v. Douglass*, 17 Kan. 291; *Davis v. Vanarsdale*, 59 Miss. 367; *Mackall v. Canal Co.*, 94 U. S. 308; *Upton v. Kennedy*, 36 Mich. 215.

³ *Board of Regents v. Linscott*, 30 Kan. 241; *Byington v. Stone*, 51 Iowa, 317; *Langley v. Chapin*, 134 Mass. 82; *Marin v. New Orleans*, 30 La. Ann. 293; *Robbins v. Barron*, 32 Mich. 36.

⁴ *Wyman v. Baer*, 46 Mich. 418; *Wallingford v. Fiske*, 24 Me. 387; *Johnson v. McIntire*, 1 Bibb, 295; *Sheehy v. Hinds*, 27 Minn. 259; *Allen v. Morse*, 72 Me. 502; *Brookings v. Woodin*, 74 Me. 224; *Shoat v. Walker*, 6 Kan. 74; *Waterson v. Devoe*, 18 Kan. 223; *Larkin v. Wilson*, 28 Kan. 515; *Sapp v. Morrill*, 8 Kan. 682; *Wadleigh v. Marathon County Bank*, 58 Wis. 546; *Hogelskamp v. Weeks*, 37 Mich. 428; *Nelson v. Goebel*, 17 Mo. 161; *Bender v. Stewart*, 75 Ind. 89; *Barton v. Gilchrist*, 19 W. Va. 223; *Ward v. Phillips*, 89 N. C. 215; *McGavock v. Pollack*, 13 Neb. 535.

⁵ *Faith v. Casey*, 2 Greene, 300.

separately, a tax deed which recites a sale of the lots in gross is void and passes no title.¹ A tax deed cuts off all prior liens and encumbrances.² If the statute directs the officer making the sale to sell the smallest quantity for which a purchaser will pay the tax and costs, a deed reciting that the premises were sold to the highest bidder is void and passes no title.³

¹ *Boardman v. Bourne*, 20 Iowa, 136. See *Grimm v. O'Connell*, 54 Cal. 524.

² *Langley v. Chapin*, 134 Mass. 82; *Robbins v. Barron*, 32 Mich. 36; *Marin v. New Orleans*, 30 La. Ann. 293.

³ *Carpenter v. Gann*, 51 Cal. 193.

CHAPTER XXXIX.

DEEDS ON EXECUTION SALES.

- § 1425. Prefatory section.
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§ 1425. **Prefatory section.**—A discussion of the law of sheriffs' deeds involves necessarily many cognate questions, as to the proceedings both before and after the execution of the deed. In a work on real property, an exhaustive treatment of such matters would manifestly be impracticable. In this chapter we have been contented with a brief discussion of the requisites of the sheriff's deed itself, and have refrained from entering the wide field of the law of executions. The following sections take up for consideration, then, the requisites of the deed, without discussing the steps leading up to the sale, or the subsequent rights of the parties.

§ 1426. **Deeds of sheriff or constable.**—When real property is sold on execution, the execution of a deed is generally essential to vest a complete title in the purchaser. "It is well settled that a sheriff's sale, of itself, although it may be manifested by a writing signed by the sheriff, does not pass the title of the debtor. To do this,

a deed must be executed by the sheriff. This is clearly the case in this State, as the statute law requires a deed to be made containing certain recitals; and until this deed is made no title passes. When the deed is made it relates back to the time of the sale, as to the debtor and his privies."¹ Prior to the execution of the deed the purchaser has merely a lien upon the land.² A deputy has power to execute the deed in the name of his principal;³ but if made in the name of the deputy the deed is void.⁴ The validity of a deed requires a prior valid judgment and execution.⁵ The certificate of sale may be assigned by the purchaser, and a deed be made to the assignee.⁶

¹ *Strain v. Murphy*, 49 Mo. 337, 341, per Adams, J. See, also, *Schermerhorn v. Merrill*, 1 Barb. 511; *Curtis v. Millard*, 14 Iowa, 128; *Barclay v. Plant*, 50 Ala. 509; *Childress v. Allin*, 17 La. 37; *Holmes v. McMaster*, 1 Rich. Ch. 340; *Edwards v. Miller*, 4 Heisk. 314; *Duprey v. Moran*, 4 Cal. 194; *Anthony v. Wessel*, 9 Cal. 103; *Spoor v. Phillips*, 27 Ala. 193; *Rogers v. Cawood*, 1 Swan, 142; *Crutsinger v. Catron*, 10 Humph. 24; *Doe v. Miller*, 10 Up. Can. Q. B. 65; *Doe v. Douston*, 1 Barn. & Ald. 230; *Leger v. Doyle*, 11 Rich. 109.

² *People v. Mayhew*, 26 Cal. 655. And see *Robinson v. Garth*, 6 Ala. 204; 41 Am. Dec. 47; *McMillan v. Richards*, 9 Cal. 365; 70 Am. Dec. 655; *Smith v. Colvin*, 17 Barb. 157; *Kelly v. The Governor*, 14 Ala. 541; *Hayes v. N. Y. Min. Co.*, 2 Colo. 273. See as to right to oil coming from flowing wells between sale of land and the acknowledgment of the sheriff's deed, *Hardenburg v. Beecher*, 104 Pa. St. 20.

³ *Anderson v. Brown*, 9 Ohio, 151; *Jackson v. Bush*, 10 Johns. 223; *Glasgow v. Smith*, 1 Over. 144; *Haines v. Lindsey*, 4 Ohio, 88; 19 Am. Dec. 586; *Kellar v. Blanchard*, 21 La. Ann. 38; *Young v. Smith*, 10 Mon. B. 293; *Evans v. Wilder*, 7 Mo. 359; *Carr v. Hunt*, 14 Iowa, 206; *Gorham v. Gale*, 7 Cowen, 739; *Sandford v. Roosa*, 12 Johns. 162.

⁴ *Evans v. Wilder*, 7 Mo. 359; *Lewes v. Thompson*, 3 Cal. 266; *Parker v. Kett*, 1 Salk. 96; *Anderson v. Brown*, 9 Ohio, 151. And see *Cloud v. El Dorado Co.*, 12 Cal. 128; *Robinson v. Hall*, 33 Kan. 139; *Mills v. Tukey*, 22 Cal. 373; *Tuttle v. Jackson*, 6 Wend. 213.

⁵ *Leland v. Wilson*, 34 Tex. 79; *Watson v. Tindal*, 24 Ga. 494.

⁶ See *Turner v. Madison Bank*, 78 Ind. 19; *Jamison v. Tudor*, 3 Mon. B. 357; *Maddux v. Watkins*, 88 Ind. 74; *McClure v. Engelhart*, 17 Ill. 47; *Conger v. Babcock*, 87 Ind. 497; *Blount v. Davis*, 2 Dev. 19; *Ehleringer v. Moriarty*, 10 Iowa, 78; *Splahn v. Gillespie*, 48 Ind. 397; *McCrary v. Brisbane*, 1 Nott & McC. 104; *Bank of U. S. v. Voorhees*, 1 McLean, 221; *Testerman v. Poe*, 2 Dev. & B. 103; *Thompson v. McManama*, 2 Disn. 213; *Brooks v. Ratcliff*, 11 Ired. 321; *Green v. Clark*, 31 Cal. 591; *Frizzle v. Veach*, 1 Dana, 212; *Small v. Hodgen*, 1 Litt. 16; *Freeman on Executions*, § 313.

Before a deed can be made the time for redemption must have elapsed.¹ A deed executed on the last day of redemption is void, because its execution is premature.² The presumption is that the officer making the sale took all the necessary steps required by law for a valid sale, and sold all that his levy gave him power to sell.³ Where a purchaser at an execution sale has taken possession of the land, and held it continuously in his own right for the period of thirty-five years, it will be presumed that a sheriff's deed was executed.⁴

§ 1427. Purchase by sheriff's agent—If the agent of the sheriff selling land on execution bids it off, with a tacit agreement that the sheriff is to pay for the land and obtain the title, without knowledge of the transaction by the judgment creditor, the sale, by a court of equity, may be declared to be void.⁵

§ 1428. Growing crops.—A purchaser at an execution sale is entitled to growing crops. They are a part of the realty.⁶ The purchaser is also entitled to timber which had fallen at the date of the deed, but which had not been converted into sawlogs or rails.⁷ If a building has been blown down by a tempest, the fragments pass to the purchaser as a part of the realty.⁸

§ 1429. When deed is executed.—Where power is given to sell lands, the power to make a deed is implied.⁹

¹ *Delahy v. McConnell*, 4 Scam. 157; *Gorham v. Wing*, 10 Mich. 486; *Gross v. Fowler*, 21 Cal. 392; *Moore v. Martin*, 38 Cal. 438; *Bernal v. Gleim*, 33 Cal. 668; *Hall v. Yoell*, 45 Cal. 584.

² *Perham v. Kuper*, 61 Cal. 331.

³ *Smith v. Crosby*, 86 Tex. 15; 40 Am. St. Rep. 818.

⁴ *Normant v. Eureka Co.*, 98 Ala. 181; 39 Am. St. Rep. 45.

⁵ *Downing v. Lyford*, 57 Vt. 507.

⁶ *Thweat v. Stamps*, 67 Ala. 96; *Frost v. Render*, 65 Ga. 15. But see, in Ohio, as to the landlord's share of a growing crop, *Albin v. Reigel*, 40 Ohio St. 339. See, also, *Long v. Seavers*, 103 Pa. St. 517.

⁷ *Leidy v. Proctor*, 97 Pa. St. 486.

⁸ *Rogers v. Gilinger*, 30 Pa. St. 185. This matter is more fully shown in the chapter on Fixtures. See § 1229, *ante*.

⁹ *Messerschmidt v. Baker*, 22 Minn. 81.

The statute of limitations does not begin running against a purchaser until the delivery of the deed to him. It takes effect at that time, and a delivery is not made by its mere execution, and by information given by the sheriff to the grantee that the deed is ready for him.¹

§ 1429 a. Presumption of delivery.—It may be presumed that a deed on execution sale was delivered from the fact that the officer making the sale gave it to the recorder, who took it to his office and recorded it, especially if the grantee took and held possession of the land sold, and the deed is in possession of his personal representative.² Until delivery of the deed, no title to the land sold passes.³ The proper officer to execute the deed is the one in office at the time the certificate of sale under execution is produced and demand for the deed is made.⁴

§ 1430. What the deed should contain.—The deed ought to state the essential facts precedent to, and authorizing the sale.⁵ But, unless required by statute, it seems that a deed is good without these recitals. Thus, it is

¹ *Jefferson v. Wendt*, 51 Cal. 573. Generally, it is considered that the title of the purchaser is incomplete until he has received a formal deed in pursuance of the sale: *People v. Mayhew*, 26 Cal. 655; *Holmes v. McMaster*, 1 Rich. Eq. (S. C.) 340; *Curtis v. Millard*, 14 Iowa, 128; 81 Am. Dec. 460; *Barclay v. Plant*, 50 Ala. 509; *Leger v. Doyle*, 11 Rich. (S. C.) 109; 70 Am. Dec. 240; *Spoor v. Phillips*, 27 Ala. 193; *Robinson v. Garth*, 6 Ala. 204; 41 Am. Dec. 47; *Strain v. Murphy*, 49 Mo. 337; *Crutsinger v. Catron*, 10 Humph. 24. But in some States the deed has been held not to be necessary to perfect the purchaser's title, on the ground that its execution is a ministerial act: *Boring v. Lemmon*, 5 Har. & J. (Md.) 223; *Leland v. Wilson*, 34 Tex. 79; *Remington v. Linthicum*, 14 Pet. 84.

² *Lewis v. Watson*, 98 Ala. 479; 39 Am. St. Rep. 82.

³ *Blodgett v. Perry*, 97 Mo. 263; 10 Am. St. Rep. 307.

⁴ *Faull v. Cooke*, 19 Or. 455; 20 Am. St. Rep. 836.

⁵ *Wack v. Stevenson*, 54 Mo. 485; *Hihn v. Peck*, 30 Cal. 288; *Donahue v. McNulty*, 24 Cal. 411; *Byers v. Wheatley*, 59 Tenn. 160; *Tanner v. Stone*, 18 Mo. 580; 59 Am. Dec. 320; *Wiseman v. McNulty*, 25 Wis. 230; *Wilhite v. Wilhite*, 53 Mo. 71. And see *Perkins v. Dibble*, 10 Ohio, 433; *Bettison v. Budd*, 17 Ark. 546; *Clark v. Sawyer*, 48 Cal. 133; *Carpenter v. King*, 42 Mo. 219; *Jordan v. Bradshaw*, 17 Ark. 106; 65 Am. Dec. 419.

held that the facts authorizing the officer to make the deed need not be recited, and, if defectively recited, the deed may be aided by the return in the execution.¹ Nor need the deed show the court from which the execution issued.² So long as the authority existed, a mistake or variance in the recital of it does not vitiate the deed, and, generally, such variances and omissions will be disregarded.³

§ 1431. **Illustrations.**—For instance, a sheriff's deed reciting a judgment against Smith & Haliburton, is not rendered invalid by the fact that the record shows a judgment against Jacob Smith and Wesley Haliburton.⁴ In Texas, the court, after citing several cases, says: "These authorities establish the rule that a recital in the deed of the authority of the officer being an immaterial part of the conveyance, no mistake or misrecital can impair its legal validity or effect. There must be a subsisting judgment and execution under which the sale is to be made; but, as the recital of either is not material, so a mistake will not affect the title."⁵ A clerical error in a sheriff's deed will not be regarded by a court of equity in adjusting equitable rights.⁶ If everything else is regular, a

¹ *Welsh v. Joy*, 13 Pick. 477.

² *Hayward v. Cain*, 110 Mass. 273.

³ *Holman v. Gill*, 107 Ill. 467; *Jackson v. Pratt*, 10 Johns. 381; *Strain v. Murphy*, 49 Mo. 337; *Cherry v. Woolard*, 1 Ired. 438; *Union Bank of Missouri v. McWhartors*, 52 Mo. 34; *Buchanan v. Tracy*, 45 Mo. 437; *Jackson v. Jones*, 9 Cowen, 182; *Henley v. Branch Bank*, 16 Ala. 552; *Carmichael v. Strawn*, 27 Ga. 341; *Hattan v. Dew*, 3 Murph. 360; *Howard v. North*, 5 Tex. 290; 51 Am. Dec. 769; *Matthews v. Thompson*, 3 Ohio, 272; *Saltonstall v. Riley*, 28 Ala. 164; 65 Am. Dec. 334; *Sneed v. Reardon*, 1 Marsh. A. K. 217; *McGuire v. Kouns*, 7 Mon. 386; 18 Am. Dec. 187; *Herrick v. Graves*, 16 Wis. 157; *Carpenter v. King*, 42 Mo. 219; *Driver v. Spence*, 1 Ala. 540; *Wilson v. Campbell*, 33 Ala. 249; 70 Am. Dec. 586; *Reid v. Heasley*, 9 Dana, 324; *Stow v. Steel*, 45 Ill. 328; *Hughes v. Dice*, 1 Swan, 329. And see, also, *Harrison v. Maxwell*, 2 Nott & McC. 347; *Averill v. Wilson*, 4 Barb. 180; *Armstrong v. McCoy*, 8 Ohio, 128; 31 Am. Dec. 435; *Carter v. Spencer*, 7 Ired. 14; *Swift v. Agnes*, 33 Wis. 228; *Doe v. Rue*, 4 Blackf. 263; *Allen v. Sales*, 56 Mo. 28.

⁴ *Union Bank of Missouri v. McWhartors*, 52 Mo. 34.

⁵ *Howard v. North*, 5 Tex. 290, 312; 51 Am. Dec. 769.

⁶ *Stow v. Steel*, 45 Ill. 328.

misrecital in the dates will not vitiate the deed.¹ A misrecital in the execution of the date of the judgment, or an irregularity in issuing the execution, does not affect the title of the purchaser.² Notwithstanding that the notice of sale has not been published for the requisite length of time, the sale, it is held, if confirmed by the court, confers upon the purchaser, in the absence of fraud, a good title.³ But in Wisconsin, it seems, a purchaser cannot claim protection as a *bona fide* purchaser, if he buys at a sale made upon an insufficient notice; he is supposed to know the defect.⁴ If a sheriff's deed is lost before registration, he may execute another.⁵ The title does not pass until the deed is executed and delivered.⁶ A misrecital of the execution, where authority to sell exists, does not affect the deed.⁷ Notwithstanding an imperfection in the return, the recitals in a sheriff's deed are *prima facie* evidence of an execution sale.⁸

§ 1432. **Description.**—The deed, of course, must contain a description of the land conveyed, and the description must be of sufficient certainty to enable the land to be ascertained, else the deed is void.⁹ A description of

¹ Harlan v. Harlan, 14 Lea (Tenn.), 107.

² Millis v. Lombard, 32 Minn. 259.

³ Wyant v. Tuthill, 17 Neb. 495.

⁴ Collins v. Smith, 57 Wis. 284.

⁵ McMillan v. Edwards, 75 N. C. 81.

⁶ Anthony v. Wessel, 9 Cal. 103.

⁷ Wilson v. Madison, 55 Cal. 5; Blood v. Light, 38 Cal. 649.

⁸ Miller v. Miller, 89 N. C. 402. The recitals in the deed as to the acts of the officer constitute *prima facie* evidence of the facts recited: Farrior v. Houston, 100 N. C. 369; 6 Am. St. Rep. 597. See, also, Owen v. Baker, 101 Mo. 407; 20 Am. St. Rep. 618.

⁹ Lafferty v. Byers, 5 Ohio, 458; Jackson v. Rosevelt, 13 Johns. 97; Winkler v. Higgins, 9 Ohio St. 599; Edmonson v. Hooks, 11 Ired. 373; Boardman v. Reed, 6 Peters, 328; Hannel v. Smith, 15 Ohio, 134; Deloach v. State Bank, 27 Ala. 437; Hughes v. Streeter, 24 Ill. 647; 76 Am. Dec. 777; McGary v. Dunn, 1 La. Ann. 338; Pound v. Pullen, 3 Yerg. 338; Landreaux v. Foley, 13 La. Ann. 114; Clarke v. Belmear, 1 Gill & J. 443; Throckmorton v. Moon, 10 Ohio, 42; Evans v. Ashley, 8 Mo. 177; Head v. James, 13 Wis. 641; Worthington v. Hylyer, 4 Mass. 196; Ronkendorff v. Taylor, 4 Peters, 349; Thomas v. Turvey, 1 Har. & G. 435; Clemens v. Rannels, 34 Mo. 579; Freeman on Executions, §§ 281, 330.

the land sold as two hundred and forty acres out of a tract containing two hundred and eighty acres, without other words to designate the land sold, renders the sale void for uncertainty in the description.¹ In a late case in Minnesota, where a description in a certificate of sale was held to be too imperfect and incomplete to identify the property which was the subject of the sale, Mr. Justice Mitchell said: "It must be borne in mind that this certificate takes effect only as the execution of a statutory power, and hence should be construed with some strictness, so as to enable the purchaser to identify the land he is bidding on, and the owner to ascertain what to redeem. A description sufficient to convey land between man and man, or which, if contained in an agreement to convey, would authorize a decree of specific performance, might not be sufficient in proceedings to sell land on an execution. When real estate is sold on legal process, it ought certainly to be described with sufficient certainty to enable a person of common understanding to identify it.² This is what the statute requires the notice of sale to contain, and certainly the certificate should contain as much. Looking at this as a practical question, and without refining on the technical distinctions between latent and patent ambiguities, it must be evident that this description would neither inform a purchaser what he was buying, nor the debtor what had been sold. It is palpably so imperfect and incomplete that the subject of the sale and conveyance could not be ascertained from it. If such a description were found in a conveyance between man and man, it is possible that it could be aided by evidence of extrinsic circumstances tending to show the intention of the parties. But in these proceedings the owner of the land intended nothing. The law, through its officers, was act-

¹ *Deloach v. State Bank*, 27 Ala. 437. In a deed the description was: "426 $\frac{2}{3}$ acres of land out of the S. W. side of the O. N. Bassett survey, No. 229, of 640 acres in Brown county." The deed was held to be void for absence of a proper description: *Bassett v. Sherrod* (Tex. Civ. App., April 15, 1896), 35 S. W. Rep. 312.

² Citing Gen. Stats. 1878, c. 66, § 317.

ing in hostility to him, with a view to enforce collection of the judgments.”¹ In a certificate of sale, a description fairly identifying the execution upon which the sale is based is sufficient; the court may, as in the case of deeds, disregard a false particular in such description.² Equity will correct a mistake in a sheriff’s deed on foreclosure, where a part of the premises is omitted from the description, when a case of mistake is established.³ A deed described the property as all the right, title, and interest of the person against whom the execution was issued, “of, in, and to the following described property, to wit: That certain tract and parcel of land and premises known as the ‘Bull Head Rancho,’ lying and being situate in Contra Costa county, of said State, and being a leasehold unexpired,” and containing a description of a certain leasehold interest. The execution debtor at the time of the sale owned the fee. The court decided that the recital as to the leasehold interest did not act as a limitation upon the general terms of description preceding, but that the purchaser obtained the fee.⁴ Where a sheriff’s deed contains an accurate but general description, the land to be conveyed may be clearly located and defined by extrinsic evidence.⁵

§ 1433. Acknowledgment.—In some States an acknowledgment is an essential part of a sheriff’s deed.⁶

¹ In *Herrick v. Ammerman*, 32 Minn. 544, 547. In this case the description held to be incomplete and imperfect, in substance, was “lot 5, block 39, in the county of Morrison, and State of Minnesota,” but the name of the village or city was not stated: *Herrick v. Ammerman*, 32 Minn. 544.

² *Bartleson v. Thompson*, 30 Minn. 161.

³ *Zingsem v. Kidd*, 29 N. J. Eq. 516. And see *Vanderbeck v. Perry*, 28 N. J. Eq. 367.

⁴ *Dodge v. Walley*, 22 Cal. 224.

⁵ *Smith v. Crosby*, 86 Tex. 15; 40 Am. St. Rep. 818.

⁶ See *Hall v. Benner*, 1 Pen. & W. 402; *McClure v. McClurg*, 53 Mo. 173; *Samuels v. Shelton*, 48 Mo. 444; *Ryan v. Carr*, 46 Mo. 483; *Murphy v. McCleary*, 3 Yeates, 405; *Adams v. Buchanan*, 49 Mo. 64; *Bellas v. McCarty*, 10 Watts, 13; *McCormick v. Meason*, 1 Serg. & R. 92; *De Haven’s Appeal*, 38 Pa. St. 373.

But generally the acknowledgment of a sheriff's deed is not essential to its validity, and hence, any defect in the certificate of acknowledgment can have no effect upon the deed.¹ The language of the deed itself may be referred to for the purpose of supporting the certificate of acknowledgment.²

§ 1434. Effect by relation.—A deed takes effect by relation to the time of the original lien which has been merged in the sale on execution.³ "The title acquired by the deed of the officer relates back to the date of the judgment lien, for the judgment is the source of his

¹ In re Smith, 4 Nev. 254; Hutchinson v. Kelly, 5 Eng. 178; Doe v. Naylar, 2 Blackf. 32; Stephenson v. Thompson, 13 Ill. 186; Ogden v. Walters, 12 Kan. 291; Dixon v. Doe, 5 Blackf. 106. A sheriff may be compelled to execute a deed by *mandamus* (People v. Fleming, 2 N. Y. 484; People v. Irwin, 14 Cal. 428); or the purchaser may move in the original case (People v. Haskins, 7 Wend. 468); or proceed in equity; Witham v. Smith, 5 Grant Ch. 203.

² Owen v. Baker, 101 Mo. 407; 20 Am. St. Rep. 618.

³ Million v. Riley, 1 Dana, 359; Clement v. Garland, 53 Me. 427; Wilhelm v. Humphries, 97 Ind. 520; Miller v. Wilson, 32 Me. 297; Brown v. Maine Bank, 11 Mass. 153; Fehley v. Barr, 66 Pa. St. 196; Bank of Pennsylvania v. Wise, 3 Watts, 394; Sharp v. Baird, 43 Cal. 577; Braddee v. Wiley, 10 Watts, 362; Hulchings v. Ebeler, 46 Cal. 557; Bank of Missouri v. Wells, 12 Mo. 361; 51 Am. Dec. 163; Bell v. Hall, 4 Greene G. 68; Cockey v. Milne, 16 Md. 200; Strain v. Murphy, 49 Mo. 337; Crowley v. Wallace, 12 Mo. 143; Jackson v. Ramsay, 3 Cow. 75; Shirk v. Wilson, 13 Ind. 129; Robinson v. Robinson, 3 Har. (Del.) 391; Hart v. Israel, 2 Browne (Pa.), 22; Martin v. Martin, 7 Md. 368; 61 Am. Dec. 364; Reichert v. McClure, 23 Ill. 516; Stephens v. Illinois M. F. Ins. Co., 43 Ill. 327; Smith v. Allen, 1 Blackf. 22; Parker v. Swan, 1 Humph. 80; 34 Am. Dec. 619; Howard v. Daniels, 2 N. H. 137; Kingman v. Glover, 3 Rich. 27; 45 Am. Dec. 756; Wood v. Turner, 7 Humph. 517; Richardson v. Thornton, 7 Jones, 458; Lackey v. Seibert, 23 Mo. 85; McClure v. Engelhart, 17 Ill. 47; Hall v. Hoxie, 3 Met. 251; Heywood v. Hildreth, 9 Mass. 393; McCormick v. McMurtree, 4 Watts, 192; Jackson v. Dickenson, 15 Johns. 309; 8 Am. Dec. 236; Kane v. Mackin, 9 Smedes & M. 387; Bell v. Hall, 4 Greene G. 68; Kirk v. Vonberg, 34 Ill. 440; Miles v. Wilson, 3 Harris, 383; Doe v. Orn, 1 Ind. 363; Leach v. Koenig, 55 Mo. 451; Shumate v. Reavis, 49 Mo. 333; Davidson v. Frew, 3 Dev. 3; 22 Am. Dec. 708; Pickett v. Pickett, 3 Dev. 6; Boyd v. Longworth, 11 Ohio, 235; Ellar v. Ray, 2 Hawks, 568; Winston v. Affalter, 49 Mo. 263. But see Bagley v. Ward, 37 Cal. 121; Davis v. Evans, 5 Ired. 525; Scheerer v. Stanley, 2 Rawle, 276; Pressnell v. Ransour, 8 Ired. 505; Hawk v. Stouch, 5 Serg. & R. 157; Swift v. Agnes, 33 Wis. 228; Thomas v. Connell, 5 Pa. St. 13.

authority, and by such relation the last act is carried back to the first in making out the title, and takes priority as of the date of the first, which is the day of the judgment lien."¹ The title of the purchaser is not dependent upon the return of the writ.² No presumption of fraud arises against a deed simply because it may be antedated to the time when the sale occurred.³ The purchaser is also, from the day of sale, subject to the consequences of an adverse possession under color of title.⁴ A deed executed to the holder of a certificate of sale was not sealed. When the omission was discovered, the successor to the sheriff who executed the first deed executed another deed in proper form. This second deed, it was decided, should relate back to the date of the first one, the grantee's right to receive a perfect title having accrued at that time.⁵ In an action of ejectment against the defendant in execution, it is said: "It is not necessary for the plaintiff, who claims as a purchaser under the execution, to do more than show the judgment of a court of competent jurisdiction, the execution issued thereon, and the sheriff's deed. Upon proof of these things, the plaintiff makes out at least a *prima facie* case against the defendant."⁶ Under a sale of foreclosure, the title of the party relates back to the date of the mortgage.⁷

§ 1435. **Worthless title.**—"A man who buys a worthless title at a sheriff's sale, and pays for it, or is allowed a credit on his lien, which is substantially the same thing, has

¹ Hibberd v. Smith, 67 Cal. 547, 566, per Thornton, J.

² Blood v. Light, 38 Cal. 653; Ritter v. Scannell, 11 Cal. 238; 70 Am. Dec. 775; Hibberd v. Smith, 67 Cal. 547; Bray v. Marshall, 75 Mo. 327; Hunt v. Loucks, 38 Cal. 382; Wilson v. Madison, 55 Cal. 8. But see Walsh v. Anderson, 135 Mass. 65.

³ Dobson v. Murphy, 1 Dev. & B. 586. See, also, on subject of relation, Testerman v. Poe, 2 Dev. & B. 103; Pressnell v. Ramsour, 8 Ired. 505; Cowles v. Coffey, 88 N. C. 340; Woodley v. Gilliam, 67 N. C. 237.

⁴ Cowles v. Coffey, 88 N. C. 340.

⁵ Kruse v. Wilson, 79 Ill. 233. A sheriff's deed relates back and takes effect as of the date of the sale: Wilson v. Spear, 68 Vt. 145; 34 Atl. Rep. 429.

⁶ Los Angeles County Bank v. Raynor, 61 Cal. 145, 146, per McKee, J.

⁷ Horn v. Jones, 28 Cal. 194; Vallejo Land Assn. v. Viera, 48 Cal. 572.

no standing to repudiate the transaction subsequently.”¹ “The rule in sheriff’s sales is *caveat emptor*. The parties do not treat for a title, but the creditor proposes to sell, and the purchaser to buy, just whatever interest the debtor may have in the land.”² If the purchaser, however, receives a deed which is invalid, he is entitled to another correct in form.³ Said Mr. Justice Bliss: “When the first deed is defective, I infer the right to make an amended one from the duty of the sheriff to correct an imperfect or false return, and especially from his duty to make a perfect deed when the facts will warrant him in so doing. The latter, it is true, is seldom necessary; for if there be a valid judgment, execution, and sale, the deed must be very defective not to operate as a transfer of title. If a new deed is to be made, a motion to set aside the former one would be regular; for it would seem that when a statutory power is once exercised, the record shows on the part of the officer a full performance of his duty, and there is apparently nothing further for him to do. Its improper exercise will not, however, excuse him from such performance, and although it would be proper for the court in its control over the proceedings of its officers, before a new deed is made, to set aside an irregular or imperfect one, that confusion might not arise from the two conveyances, yet the last and correct deed is not void, and it cannot be impeached in this proceeding.”⁴ The defendant, in case there is a valid judgment and execution, is as much bound by the deed of a sheriff as if it had been made by the defendant himself.⁵

¹ Wells v. Van Dyke, 106 Pa. St. 111, 115.

² Wells v. Van Dyke, 106 Pa. St. 111, 115. See, also, Weidler v. The Bank, 11 Serg. & R. 134; Boro v. Harris, 13 Lea (Tenn.), 36.

³ Davis v. Evans, 5 Ired. 525; Adams v. Thomas, 6 Binn. 254; Doe v. Miller, 10 Up. Can. Q. B. 65; Thornton v. Miskimmon, 48 Mo. 219. See, also, Bartlett v. Judd, 21 N. Y. 200; 78 Am. Dec. 131; Bright v. Boyd, 1 Story, 486; Ware v. Johnson, 55 Mo. 500; Moreau v. Branham, 27 Mo. 351; Moreau v. Detchemendy, 18 Mo. 522; Johns v. De Rome, 5 Blackf. 421.

⁴ Thornton v. Miskimmon, 48 Mo. 219, 222.

⁵ Blood v. Light, 38 Cal. 658; Ingersoll v. Truebody, 40 Cal. 611; Dono-

§ 1436. **Title obtained by purchaser.**—The sale can transfer only the title of the judgment defendant.¹ In Arkansas, however, the purchaser of land at an execution sale on his own judgment takes subject to equities of which he has either actual or constructive notice, but to no other.² A purchaser, unaware of a senior mortgage not discovered from the record because the initial letter of a middle name was omitted, acquires no equity superior to that possessed by the mortgagee.³ The purchaser acquires the right to covenants passing with the land.⁴ The interest of the purchaser is superior to that of junior lienholders;⁵ but, of course, not to that of senior lienholders.⁶

hue v. McNulty, 24 Cal. 411; *Dodge v. Walley*, 22 Cal. 225; *McDonald v. Badger*, 23 Cal. 393; *Jackson v. Vanderheyden*, 17 Johns. 167; 8 Am. Dec. 378; *Pollard v. Cocke*, 19 Ala. 188; *Jackson v. Roberts*, 7 Wend. 83; *Smith v. Houston*, 16 Ala. 111; *Den v. Winans*, 2 Green, 6; *Cooper v. Galbraith*, 3 Wash. C. C. 550; *Love v. Powell*, 5 Ala. 58. See as to strangers, *French v. Edwards*, 13 Wall. 506; *Zabriskie v. Mead*, 2 Nev. 285; *Donohue v. McNulty*, 24 Cal. 411.

¹ *Carney v. Emmons*, 9 Wis. 114; *O'Neal v. Wilson*, 21 Ala. 288; *Rutherford v. Green*, 2 Ired. Eq. 122; *Pontiac Bank v. King*, 110 Ill. 254; *Stevens v. King*, 21 Ala. 429; *Treptow v. Buse*, 10 Kan. 170; *Emerson v. Sansome*, 41 Cal. 552; *Taylor v. Eckford*, 11 Smedes & M. 21; *Mansfield v. Gregory*, 8 Neb. 432.

² *Newman v. Davis*, 24 Fed. Rep. 609.

³ *Clute v. Emmerich*, 99 N. Y. 344; *Boro v. Harris*, 13 Lea (Tenn.), 36.

⁴ *White v. Whitney*, 3 Met. 81; *Sweet v. Green*, 1 Paige, 473; 19 Am. Dec. 442; *Redwine v. Brown*, 10 Ga. 320; *Lefort v. Todd*, 32 N. J. L. 124; *Carter v. Denman*, 3 Zab. 260; *McCrary v. Brisbane*, 1 Nev. & M. 104; *Lewis v. Cook*, 13 Ired. 196; *Kellogg v. Wood*, 4 Paige, 578; *Markland v. Crump*, 1 Dev. & B. 94; 27 Am. Dec. 230. That the purchaser takes subject to the liens, easements, and equities to which the land was subject while the title was in the defendant, see *Riddle v. Bryan*, 5 Ohio, 49; *Miller v. Jamison*, 24 N. J. Eq. 41; *Corwin v. Benham*, 2 Ohio St. 36; *Taylor v. Lowenstein*, 50 Miss. 278; *Walke v. Moody*, 65 N. C. 599; *Richardson v. Stillinger*, 12 Gill & J. 477; *Blakenship v. Douglass*, 26 Tex. 225; *Polk v. Gallant*, 2 Dev. & B. Eq. 395; *Freeman v. Mebane*, 2 Jones Eq. 44; *Hart v. Felder*, 4 Desaus. Eq. 202; *Meade v. Thompson*, Walk. Ch. 450; *Boynton v. Winslow*, 37 Pa. St. 315.

⁵ *Ex parte Elwood*, 1 Denio, 633; *Barden v. Brady*, 37 Ga. 660; *Willis v. Willis*, 22 La. Ann. 447.

⁶ *Lathrop v. Brown*, 23 Iowa, 40; *Shotwell v. Murray*, 1 Johns. Ch. 512; *Littlefield v. Nichols*, 42 Cal. 372; *Bruce v. Vogel*, 38 Mo. 100; *Rankin v. Scott*, 12 Wheat, 177. See, also, *Woodley v. Gilliam*, 67 N. C. 237; *Vickory v. Vickory*, 1 Harris, 193, n.; *Custer v. Detterer*, 3 Watts

The purchaser's title cannot be affected by secret frauds or defects in the legal proceedings, resulting in the execution.¹ But he must have paid a valuable consideration to claim this right.² The purchaser at a sale to enforce a vendor's lien acquires the title of both vendor and vendee.³ A person who has purchased under an agreement with the defendant to allow him to redeem, may be compelled, to do so. He is considered a trustee.⁴ As a general proposition,

& S. 28; *Harrison v. McHenry*, 9 Ga. 164; *Commonwealth v. Alexander*, 14 Serg. & R. 257; *Duncan v. Reiff*, 3 Pen. & W. 368.

¹ *Mansfield v. Hoagland*, 46 Ill. 359; *Winston v. Otley*, 25 Miss. 451; *Stokes v. Geddes*, 46 Cal. 17; *Natchez v. Minor*, 10 Smedes & M. 246; *Drèxel v. Man*, 6 Watts & S. 343; *Thorpe v. Beavans*, 73 N. C. 241; *Bull v. Sheredine*, 1 Har. & J. 410; *Mansfield v. Walsh*, 36 Iowa, 534; *Reeve v. Kennedy*, 43 Cal. 643; *Fetterman v. Murphy*, 4 Watts, 424; 28 Am. Dec. 729; *Beeson v. Beeson*, 9 Pa. St. 289; *Hamlin v. McCahill*, Clarke Ch. 249; *Williams v. Deraan*, 23 N. J. Eq. 385; *Sowles v. Harvey*, 20 Ind. 217. But this does not apply to the plaintiff or his attorney, as they will be assumed to have had notice: *Stephens v. Dennison*, 1 Or. 19; *King v. Cushman*, 41 Ill. 31; *Bybee v. Ashby*, 2 Gilm. 151; 43 Am. Dec. 47; *Pettingill v. Moss*, 3 Minn. 223; 74 Am. Dec. 747; *Steinbach v. Leese*, 27 Cal. 295; *Barber v. Reynolds*, 44 Cal. 520; *Stewart v. Croes*, 5 Gilm. 442; *Raub v. Heath*, 8 Blackf. 575; *Winston v. Otley*, 25 Miss. 451; *Moody v. Harper*, 38 Miss. 599; *Harrison v. Doe*, 2 Blackf. 1.

² *Swayze v. Burke*, 12 Peters, 11; *Jackson v. Summerville*, 13 Pa. St. 359; *Paul v. Fulton*, 25 Mo. 156; *Vattier v. Hinde*, 7 Peters, 252; *Hutchins v. Chapman*, 37 Tex. 612; *Blight v. Banks*, 6 Mon. 192; *Wormley v. Wormley*, 8 Wheat. 421; *Losey v. Simpson*, 3 Stockt. Ch. 246; *Williams v. Hollingsworth*, 1 Strob. Eq. 103; *Jewett v. Palmer*, 7 Johns. Ch. 65; *Bush v. Bush*, 3 Strob. Eq. 131; *Lewis v. Phillips*, 17 Ind. 108; 79 Am. Dec. 457; *Wood v. Mann*, 1 Sum. 506; *Colquitt v. Thomas*, 8 Ga. 258; *Doswell v. Buchanan*, 3 Leigh, 365; 23 Am. Dec. 280; *Dugan v. Vattier*, 3 Blackf. 245; 25 Am. Dec. 105. As to part payment and protection *pro tanto*, see *Juvenal v. Jackson*, 14 Pa. St. 519; *Wells v. Morrow*, 38 Ala. 125; *Beck v. Ubrich*, 13 Pa. St. 631; 53 Am. Dec. 507; *Pickett v. Barron*, 29 Barb. 505; *Haughwout v. Murphy*, 22 N. J. Eq. 531; *Flagg v. Mann*, 2 Sum. 487; *Frost v. Beekman*, 1 Johns. Ch. 288; *Lewis v. Bradford*, 10 Watts, 67.

³ *Vierheller's Appeal*, 24 Pa. St. 106; 62 Am. Dec. 365; *Zeigler's Appeal*, 69 Pa. St. 471.

⁴ *Williams v. Williams*, 8 Bush, 241; *Lillard v. Casey*, 2 Bibb, 459; *Martin v. Martin*, 16 Mon. B. 8; *Arnold v. Cord*, 16 Ind. 177; *Green v. Ball*, 4 Bush, 586; *Dobson v. Erwin*, 1 Dev. & B. 569; *Denton v. McKenzie*, 1 Desaus. Eq. 289; *Strong v. Glasgow*, 2 Murph. 289; *Miller v. Antle*, 2 Bush, 407; *Combs v. Little*, 3 Green Ch. 310; *Langhorne v. Payne*, 14 Mon. B. 624; *Freeman on Executions*, § 337.

any error in the proceedings, or any irregularity will not affect the title of the purchaser, where he is not culpable. His title cannot be collaterally attacked.¹ An after-acquired title does not pass to a purchaser at a sheriff's sale.² If, by reason of a failure to give a proper description of the land, a sale is invalid, the purchaser, it is held, is subrogated to the lien of the judgment.³ By a sheriff's deed made under a foreclosure sale, the purchaser obtains whatever interest was created by the mortgage and vested in the mortgage, and no greater interest.⁴ Although the deed may be informal, yet, if made with authority, it passes title.⁵ A purchaser cannot secure a valid title by the exercise of some falsehood or device by which he has been able to secure the property at a less sum than otherwise would have been obtained; but fraud must be proved.⁶ One of the provisions of the statute in California is, that if an officer sells without the notice prescribed by the statute, he is to forfeit five hundred dollars to the party ag-

¹ *Moore v. Neil*, 39 Ill. 256; *Boles v. Johnson*, 23 Cal. 226; *Avery v. Rose*, 4 Dev. 553; *Wilkins v. Huse*, 9 Ohio, 154; *Reid v. Largent*, 4 Jones, 454; *Park v. Darling*, 4 Cush. 197; *Hewitt v. Weatherby*, 57 Mo. 276; *Pope v. Bradley*, 3 Hawks, 16; *Dingledine v. Hershmann*, 53 Ill. 280; *Warren v. Twilley*, 10 Md. 39; *Elliott v. Knott*, 14 Md. 121; *Jackson v. Roosevelt*, 13 Johns. 97; *Solomon v. Peters*, 37 Ga. 251; *Ogden v. Walters*, 12 Kan. 282; *Armstrong v. Jackson*, 1 Blackf. 210; 12 Am. Dec. 225; *Mordecai v. Speight*, 3 Dev. 428; 24 Am. Dec. 266; *Norton v. Quimby*, 45 Mo. 388; *Frakes v. Brown*, 2 Blackf. 295; *Cabell v. Grubbs*, 48 Mo. 353; *Doe v. Meyers*, 9 Up. Can. Q. B. 465; *Dowdell v. Neal*, 10 Ga. 148; *Sullivan v. Hearnden*, 11 Ga. 294; *Bolgiano v. Cooke*, 19 Md. 375; *Oxley v. Mizle*, 3 Murph. 250; *Marshall v. Greenfield*, 8 Gill. & J. 349; *Manahan v. Sammon*, 3 Md. 463; *Rigg v. Cook*, 4 Gilm. 336; *Kelsey v. Dunlap*, 7 Cal. 160; *Dice v. Penn*, 2 Swan, 561; *Hendrick v. Davis*, 27 Ga. 167; 73 Am. Dec. 726; *Swiggert v. Kollock*, 3 Houst. 326; *Cooper v. Barrall*, 10 Pa. St. 491; *Hayden v. Dunlap*, 3 Bibb, 216; *Durham v. Heaton*, 28 Ill. 264; *Johnson v. Reese*, 28 Ga. 353; *O'Conner v. Youngblood*, 16 Ala. 718; *Knight v. Leak*, 2 Dev. & B. 133.

² *McMillan v. Richards*, 9 Cal. 365; *Kenyon v. Quinn*, 41 Cal. 325; *Westheimer v. Reed*, 15 Neb. 662.

³ *Jones v. Smith*, 55 Tex. 383. But see as to a sale under a void judgment, *Grigsby v. Barr*, 14 Bush, 330.

⁴ *Branham v. San Jose*, 24 Cal. 585.

⁵ *Sherman v. McCarthy*, 57 Cal. 507.

⁶ *Barton v. Hunter*, 101 Pa. St. 406.

grieved, in addition to his actual damages. The question arose whether a purchaser at an execution sale without notice was an "aggrieved party," within the meaning of the section. The court decided that he was not. "Such a sale," said Mr. Justice McKee, "is either valid or invalid; it passes the title to the purchaser, or it does not. If it be a nullity and passes no title, the purchaser sustains no injury, and no right of action for the forfeiture accrues. Such an action is not maintainable, even by a party to the execution, unless he has been deprived of his property by a sale under it without notice; and if he has been deprived of his property by reason of the fact that it has passed from him by the sale to a purchaser at the sale, then the latter is not injured, for he has obtained what he bought."¹ Questions of this sort are confined to the officer who conducts the sale and the parties to the execution. If the purchaser dies before obtaining his deed, a deed subsequently made pursuant to the sale to the purchaser, though void, does not render the title of those claiming under him void.² If the deed is void, the officer may execute another one after the return day of the writ.³

§ 1437. Sale of interest of one defendant.—If, on a joint judgment against two defendants, an execution is levied on the land as the property of one of them, and the sheriff sells and conveys the interest of such defendant, the purchaser will not acquire by the deed any interest possessed by the other defendant in the land.⁴

¹ *Kelley v. Desmond*, 63 Cal. 517, 518. See under the statute in Massachusetts, *Sexton v. Nevers*, 20 Pick. 451.

² *Diamond v. Turner*, 11 Wash. 189; 39 Pac. Rep. 379.

³ *Higgins v. Bordages* (Tex. Civ. App., Oct. 18, 1894), 28 S. W. Rep. 350.

⁴ *Frederick v. The Missouri River etc. R. R. Co.*, 82 Mo. 402.

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